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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

VOYAGER 1000,
PALMER K. WARD, Receiver,
*Petitioners,*

*v.*

CIVIL AERONAUTICS BOARD,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners, Voyager 1000 (a private air travel club), and its receiver under the laws of the State of Indiana, Palmer K. Ward, respectfully petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the decision of that Court affirming and enforcing an order of the Civil Aeronautics Board holding that Voyager 1000 was a "common carrier" of passengers.

## JURISDICTION

On March 1, 1973, the Civil Aeronautics Board found that Voyager 1000 was a common carrier of passengers and ordered Voyager 1000 to cease and desist from engaging in air transportation as a common carrier without obtaining a certificate of convenience and necessity in violation of § 401(a) of the Federal Aviation Act of 1958, 49 U.S.C. § 1371(a). The order and opinion of the Civil Aeronautics Board are appended hereto as Exhibit B. On November 14, 1973, the Court of Appeals rendered its decision affirming and enforcing the prior order of the Civil Aeronautics Board. The order and opinion of the Court of Appeals (not yet reported) are appended hereto as Exhibit C. On December 4, 1973, the Court of Appeals stayed the issuance of the mandate in the case for a period of thirty days to permit Petitioners to file this Petition for Certiorari. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. §1254(1) and 49 U.S.C. §1486(f).

## QUESTIONS PRESENTED

1. Is a private air travel club a common carrier of passengers and thus subject to economic regulation by the Civil Aeronautics Board?

2. Did the Court of Appeals err in upholding the determination by the Civil Aeronautics Board that Voyager 1000, a private air travel club, has violated § 401(a) of the Federal Aviation Act of 1958, 49 U.S.C. § 1371(a)?

3. Is the order of the Civil Aeronautics Board supported by substantial evidence? Does it have a reasonable basis in law?

4. Did the Civil Aeronautics Board neglect its duty

in failing to adopt regulations governing private air travel clubs?

5. Was the Civil Aeronautics Board estopped from holding that Voyager violated the provisions of the Federal Aviation Act because of prior administrative construction of common carriage?

6. Does the retrospective effect of the cease and desist order of the Civil Aeronautics Board, coupled with the CAB's failure to adopt regulations and prior administrative construction of common carriage, violate the United States Constitution and Amendments?

7. Does the Civil Aeronautics Board order violate the United States Constitution because it unreasonably restricts the rights of the public to travel?

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Aviation Act of 1958,

§ 401(a), 49 U.S.C. § 1371(a):

> "(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

§ 101(3), 49 U.S.C. § 1301(3):

> "(3) 'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest."

§ 101(10), 49 U.S.C. § 1301(10):

> "(10) 'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."

§ 101(21), 49 U.S.C. § 1301(21):

> "(21) 'Interstate air transportation', 'overseas air transportation', and 'foreign air transportation', respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—
>
> "(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;
>
> "(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and
>
> "(c) a place in the United States and any place outside thereof;
>
> whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation."

Amendment 5 to the United States Constitution:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

## STATEMENT OF THE CASE

Petitioner, Voyager 1000 ("Voyager"), was formed as an Indiana not-for-profit corporation in 1964 as a private air travel club. Under its Code of By-Laws, members of Voyager must apply for membership and pay an initial membership fee and monthly dues. The members have legal rights similar to the shareholders of an Indiana corporation for profit, including rights to notice of elections, rights to nominate directors, and a right to vote. However, under the Indiana Not-For-Profit Corporation Act of 1971, IC 1971, 23-7-1.1-1, *et seq.*, Burns Ind.Stat.Ann. §§ 25-501, *et seq.*, any assets of the corporation escheat to the State of Indiana on dissolution. That law also contains a prohibition against any returns of money to officers and directors other than for moneys advanced or services actually performed.

From incorporation in 1964 until December of 1971, Voyager grew to 14,500 members and had owned as many as five aircraft. Until November 19, 1973, when a receiver for Voyager was appointed following the decision of the Court of Appeals, the club provided its members with an extensive flight schedule from Indianapolis, along with various social activities and periodic promotional material regarding flights and general membership news. Over eighty people were employed in the operation and maintenance of its aircraft and in its office services. Since its inception, but particularly since 1968, Voyager notified members of scheduled flights and promoted Voyager memberships by buying space in the news media. Accompanying these efforts were various specialized programs to attract new members, including open houses, student membership drives, and sweepstakes to induce existing members to interest others.

The Bureau of Enforcement of the Civil Aeronautics

Board ("CAB") filed a petition for enforcement and complaint against Voyager and three individuals on November 16, 1971, pursuant to § 1002(b) of the Federal Aviation Act of 1958 ("Act"), 49 U.S.C. § 1482(b), and 14 C.F.R. § 302.201. The petition and complaint alleged that Voyager and the individual respondents were violating § 401(a) of the Act, 49 U.S.C. § 1371(a), by soliciting the general public for, and operating flights in, air transportation, as a common carrier of passengers without prior approval of the CAB. All respondents answered and presented affirmative defenses asserting that Voyager fulfilled the essential requirements for legal private club flights not subject to regulation by the CAB. A two-day hearing was held before Administrative Law Judge William J. Madden, a veteran of over 30 years' experience with the CAB, who issued an initial decision on June 22, 1972, ordering the petition for enforcement and the complaint dismissed. Judge Madden's initial decision is appended hereto as Exhibit A. The Bureau of Enforcement petitioned for discretionary review of the initial decision, and the CAB undertook review.

Two of the five members of the CAB heard oral argument on the review. On March 1, 1973, the CAB issued Order 73-3-1, with opinion, reversing Judge Madden's initial decision and directing Voyager to cease and desist from engaging in the transportation of passengers as a common carrier in violation of § 401(a) of the Act. The proceeding, insofar as it related to the three individual respondents, was dismissed, and that dismissal is not at issue here. The CAB's order and opinion are appended hereto as Exhibit B.

Voyager filed its petition for review of the CAB's order on March 8, 1973, in the Court of Appeals for the Seventh Circuit, pursuant to 49 U.S.C.A. § 1486(a). After briefs

and oral argument by counsel for Voyager and the CAB, the Court of Appeals on November 14, 1973, ordered the CAB's prior order enforced. The order and opinion of the Court of Appeals are appended hereto as Exhibit C. All Voyager flights ceased on the day the Court of Appeals' decision was made public, and a receiver for the club was appointed under Indiana law on November 19, 1973.

Voyager did not violate any CAB regulations because there never were any regulations promulgated by the CAB pertaining to its operation. Voyager has, however, complied with the safety regulations of the CAB's sister agency, the Federal Aviation Administration ("FAA"), and presently holds an operating certificate issued by the FAA under part 123 of the Federal Aviation Regulations, 14 C.F.R. §§ 123.1-53. Until the bringing of the enforcement proceeding involved in this case, Voyager had operated for seven years without complaint from the CAB or any other governmental agency. Indeed, this is the first time the CAB has charged that any of the thirty air travel clubs throughout the country must obtain a certificate of public convenience and necessity or some other CAB authorization before providing this type of recreational service to its dues-paying members. Since the Voyager action began, however, the Bureau of Enforcement of the CAB has filed three other enforcement proceedings against air travel clubs, and there are indications that the Voyager action is seen by the CAB as the beginning of a campaign to eliminate all air travel clubs.

## REASONS FOR GRANTING THE WRIT

1. **The Decision of the Court of Appeals Raises the Significant and Novel Issue of Whether Private Air Travel Clubs Need to be Certified by the Civil Aeronautics Board As Common Carriers of Passengers.**

A common carrier has to have CAB approval before it can fly; a private carrier does not. Congress has said so in § 401(a) of the Federal Aviation Act of 1958, 49 U.S.C. § 1371(a), and the various definitions set out in § 101 of the Act, 49 U.S.C. § 1301. Voyager will show in the second and third sections below how the Court of Appeals (and the CAB) misapplied the applicable standards of what is or what isn't a common carrier to the facts surrounding Voyager's operation.

However, Voyager wants to emphasize at the outset the importance of this case to thousands of people throughout the country—all the people who belong to the thirty or more private air travel clubs in the United States. The issue of whether a private air travel club is engaged in private carriage and thus is not within the jurisdiction of the CAB has not been decided before. This is the first time the CAB has attempted to find an air travel club in violation of § 401(a) of the Act, and no federal court (except in this case) has ever before had the opportunity to review such a case. This is a case of first impression, and the Court of Appeals has erroneously decided an important question of federal law which has not been, but should be, decided by the Supreme Court.

The CAB has never promulgated any regulations concerning private air travel clubs, allowing Voyager and its members to assume that private air travel clubs could function without CAB intervention. Voyager has not tried to evade the law or to somehow impede the work of federal regulatory agencies. Indeed, Voyager has operated since 1968 in full compliance with the safety regulations of the Federal Aviation Administration. As Administrative Law Judge William J. Madden, the man who heard the evidence initially, said:

"The record will not support a contention that

> the managers of Voyager, from its inception to its present status, have acted otherwise than in good faith to carry out the basic plan [of private carriage]. Similarly it will not support a contention that there was any intent on their part to evade or avoid compliance with any applicable laws. Insofar as the operation required the sanction of the FAA they assiduously sought to achieve full compliance and they took an active part in the rulemaking proceeding which produced Part 123. In the one instance when a question of a legal nature arose as to the club's right to be covered by Part 123 they sought and obtained advice of legal officers of the FAA." (Exhibit A, pages 43-44)

The fact is that the CAB's allegation that an air travel club is a common carrier is not only inconsistent with its own passivity on the subject from 1964 through 1971, but it is inconsistent with the earlier expressed views of the FAA. As late as August 2, 1971, just three months before the Bureau of Enforcement of the CAB filed a complaint, the FAA advised Voyager as follows:

> "As air travel clubs are a non-profit organization, they are not allowed to fly passengers or cargo for hire. Therefore, they are not required to, or allowed to secure from the CAB a Certificate of Convenience and Necessity, as required by commercial operators.
>
> "It is of [sic] the opinion of the FAA that as long as air travel club aircraft are owned by the club members on a non-profit basis, solely for the carriage of its members on pleasure trips, these aircraft should be regarded as private carriage versus common carriage by commercial operators." (Exhibit C, page 86)

Voyager will argue, as it did in the Court of Appeals, that these prior actions and inactions by federal regulatory agencies point squarely to the conclusion that the CAB's present construction of the Act is unreasonable and legally

incorrect. The doctrine of administrative estoppel, as recently enunciated in *United States* v. *Pennsylvania Indus. Chem. Corp.*, — U.S. —, 93 S.Ct. 1804 (1973), applies here. Moreover, the retrospective effect of the CAB's cease and desist order raises serious constitutional questions. For the order of the CAB does not merely prohibit Voyager from doing certain things that the CAB has now found objectionable under the Act; the order stops Voyager from carrying its current members even if Voyager were to discontinue all practices the CAB dislikes. In other words, Voyager could limit its membership and stop all advertising (the thing the CAB found constituted a "holding out" of transportation to the public) and still be in violation of the CAB's cease and desist order. Without sufficient notice of the acts the CAB now finds illegal, without the knowledge that a completely new set of standards would be applied for the first time to air travel clubs by the CAB, Voyager is being forced to stop all operations, get rid of all assets, and disband. Surely that amounts to an appropriation of property without due process of law under the Fifth Amendment to the United States Constitution. Judge Pell of the Court of Appeals, in a reluctant concurrence below, spoke eloquently about a related constitutional problem:

> "It is somewhat ironical, and perhaps to be deplored, that in a society which generally encourages competitive free enterprise a service is to be stifled which a substantial segment of citizenry of the Midwest portion of the country found to be highly desirable in making available travel by air which might not otherwise have been enjoyed by them, and which travel has been conducted in full compliance with governmental safety requirements.
>
> "While this travel presumably was ordinarily for pleasure rather than business reasons, the right of

such movement is one that has received Supreme Court recognition.

> 'This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.' *Shapiro* v. *Thompson*, 394 U.S. 618, 629 (1969)." (Exhibit C, pages 95-96)

Regardless of the inequity of the CAB's action, however, the fact remains that the CAB *did* decide to issue an order against Voyager calculated to put this private air travel club, and all others, out of existence and thereby stop for good the banding together of people interested in traveling with their friends to unusual places at unusual times. That is exactly the end the CAB will accomplish if the writ of certiorari is not granted. Since the filing of the complaint against Voyager by the CAB's Bureau of Enforcement, three other complaints have been filed. In addition, Voyager understands the FAA has instructed all of its regional offices to reexamine the operations of each air travel club now operating under FAA regulation to see if the club complies with the notions about common carriage expressed by the CAB in the *Voyager* decision.

In breaking this new ground, the CAB acted arbitrarily and illegally, and this Court should issue a writ of certiorari to correct the error. For if the path surveyed by the CAB and by the Court of Appeals is followed, the end result will be yet another private institution smothered by federal administrative action. Voyager seeks only the chance to test the unprecedented action of the CAB in this Court.

**2. A Private Air Travel Club Is Not a Common Carrier of Passengers.**

The statute at issue here is the Federal Aviation Act of 1958. Section 401(a) of the Act, 49 U.S.C. § 1371(a), says that "[n]o air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation." The definition section of the Act, § 101, 49 U.S.C. § 1301, describes what is meant by "air carrier" and "air transportation" as follows:

> "(3) 'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided,* That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.
>
> "• • •
>
> "(10) 'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."

As to what is interstate, overseas or foreign air transportation, the applicable definition is found in § 101(21), 49 U.S.C. § 1301(21):

> "'Interstate air transportation', 'overseas air transportation', and 'foreign air transportation', respectively, mean the carriage by aircraft of persons or property *as a common carrier* for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—
>
> (a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State

> of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;
>
> (b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and
>
> (c) a place in the United States and any place outside thereof;
>
> whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation." (Emphasis added.)

In short, the question before the CAB's administrative law judge, the full CAB, and then the Court of Appeals, was whether on the basis of the facts presented Voyager, a private air travel club, became a "common carrier" of passengers. The Act itself does not define common carrier, but it seems generally accepted by courts and administrative agencies that a common carrier is one who "holds himself out to the public as willing to carry all passengers for hire indiscriminately." *Arrow Aviation, Inc.* v. *Moore,* 266 F.2d 488, 490 (8th Cir. 1959). For similar definitions, *see Las Vegas Hacienda, Inc.* v. *C.A.B.,* 298 F.2d 430, 434 (9th Cir.), *cert. denied,* 369 U.S. 885, 82 S.Ct. 1158 (1962), and *State of Washington ex rel. Stimson Lumber Co.* v. *Kuykendall,* 275 U.S. 207, 211, 48 S.Ct. 41, 42 (1927).

There are few precedents in this area to help judge whether Voyager has violated the Act. The Court of Appeals cites only two court decisions, namely, the *Hacienda* case and *Saturn Airways, Inc.* v. *C.A.B.,* 483 F.2d 1284 (D.C. Cir. 1973), both of which dealt in some way with the

distinction between individually ticketed and private markets. The *Saturn* case, however, involved the issue of whether the CAB acted illegally in promulgating new charter regulations; there was no issue of common carriage and no issue of the impact of a *failure* by the CAB to promulgate regulations. As the Court of Appeals acknowledged in its *Voyager* opinion, the CAB has refused to take a position as to what criteria should be used to distinguish private carriers from common carriers for purposes of the CAB's jurisdiction. (Exhibit C, page 86) Neither the CAB nor its attorneys have the courage to state what is legal and, more importantly, what distinguishes a legal from an illegal operation. Moreover, the Court of Appeals said that the "record is void of criteria which would indicate sufficient differentiation between Voyager services and individually ticketed services." (Exhibit C, page 95) That is a clearly erroneous statement. For it is undisputed that Voyager has the following attributes and indicia of private carriage:

(a) It is organized as a corporation with appropriate Articles and By-Laws.

(b) All operations are nonprofit and initiation fees and dues are set by the By-Laws at a level sufficient to defray the contemplated operating expenses of the club.

(c) Members have certain legal rights, *e.g.*, to nominate and vote for directors, and to raise questions at regularly called meetings.

(d) The club makes a change in the members' life style. A member realizes benefits such as the fun of traveling together with friends or meeting and communicating with new people, and attending regular social events such as dances.

(e) Members pay substantial dues—$84 annually, a

figure much in excess of prestigious clubs such as the National Smithsonian Club whose dues are $15 per year. Voyager dues amounted to $886,000 in 1971.

(f) Members stay members; there is no significant turnover in the membership. Only 216 resigned in the first nine months of 1971.

(g) Members share club assets. While title to assets in a nonprofit corporation is not the same as for a profit corporation, the members have an interest in the assets superior to anyone else except upon dissolution.

(h) Members travel on irregular schedules and aircraft are operated for a relatively small number of hours.

Do these activities and rights of members of Voyager apply to the general public that rides TWA, American, United, and other commercial airlines? Of course not! Voyager does not transport the public generally. It does not hold itself out to the public as willing to carry all passengers for hire indiscriminately. Voyager transports its *members* who have joined the club, paid their dues, and complied with the requirements of membership.

Further, the CAB and the Court of Appeals have failed to challenge the first and most important finding of the Administrative Law Judge:

> "In its concept and in its operation at least through 1968, Voyager was a private club engaged in private carriage under any reasonable legal measurement. It originated with a relatively small group with a common interest in recreational travel and in a plan to provide, with their own facilities, round-trip flights of durations and to destinations and at costs not generally available on the commercial services. In effectuating such a plan, Voyager was in a clear posture of privacy—as a club and as a

carrier—not subject to the economic regulatory aspects of the Federal Aviation Act of 1958.

"* * *

"* * * If in its concept Voyager was a private club engaging in private carriage, as it clearly was, simply increasing the number of members does not add an insidious noted [*sic*]." (Exhibit A, pages 43 and 45)

The CAB really comes to the conclusion that all air travel clubs are illegal. Yet, the Board has permitted the operation of these clubs for years simply because the law has always recognized the distinction between private carriage and common carriage. If the CAB's order in this case is enforced, that traditional distinction will be destroyed.

The overriding intent of everyone involved with Voyager and the numerous other air travel clubs in this country is to give to people willing to make the investment a chance to band together for travel with their friends to unusual places at unusual times. This is not an effort to compete with regularly scheduled airlines. Indeed, the choice for many Voyager members and members of similar clubs is whether to belong to the club and travel or not to belong and not travel. The choice is not between traveling with Voyager and traveling with a regularly scheduled airline. There is not one word of evidence in the record that any passengers have diverted from a commercial carrier.

The CAB has simply decided that it does not like that form of recreation, but the fact that it does not like the idea does not mean it can put travel clubs out of business. The Federal Aviation Act of 1958 was not intended to reach groups freely associating for recreational travel that have the attributes of private carriage previously discussed.

### 3. The Court of Appeals Committed Reversible Error in Holding That There Was Substantial Evidence and a Reasonable Basis in Law for the CAB's Finding That Voyager, a Private Air Travel Club, Has Held Itself Out to the General Public as a Common Carrier of Passengers in Violation of § 401(a) of the Federal Aviation Act.

Voyager is a private air travel club and not a common carrier. As found by the Administrative Law Judge who listened to the evidence in this proceeding firsthand, Voyager has all the attributes of a private club providing a unique travel experience to a bona fide membership that can reasonably be distinguished from the general public. There was no holding out of air transportation to the general public, and despite a healthy growth in membership over the past nine years, Voyager has not moved into the status of a common carrier. The contrary findings, conclusions and order of the CAB and the Court of Appeals are not supported by substantial evidence, as provided by § 1006(e) of the Act, 49 U.S.C. § 1486(e), or by a reasonable construction of the Act. Voyager has not violated § 401(a) of the Act; the CAB's cease and desist order should, therefore, be set aside.

A review of the Court of Appeals' decision must begin with the character of Voyager itself. The CAB discussed the issue only obliquely by attaching to its opinion excerpts from Judge Madden's initial decision. The Court of Appeals discussed Voyager's operations in part I of its opinion. Both have not, and cannot, dispute the fact that Voyager is a private club, with a corporate structure that gives members a voice in the club's affairs. The standards used to judge Voyager should be no different than those used to judge any other private club.

So, if the CAB and the Court of Appeals have suddenly decided for the first time that a private club is a common

carrier, what is it about the club that makes it so? What has Voyager done to evoke the wrath of the CAB? Voyager believes the CAB does not like two things: Voyager's advertising and its growth.

Take Voyager's advertising first. The CAB's opinion is replete with references to Voyager's advertising program, and it is clear that the CAB relied on the use by Voyager of newspaper space to establish a "holding out" to the public of common carrier services. Voyager's advertising and promotion consist of monthly newsletters and flight schedules to members, advertisements in the Sunday travel supplement of The Indianapolis Star and ads in other publications, direct mail brochures and promotional material to prospective members, and an occasional open house to attract new members. Copies of the flight schedules and information on the weekly socials are also sent to the members. Judge Madden attached copies of some of these materials as appendices to his initial decision. See Exhibit A hereto.

The newspaper advertisements typically refer to several destinations, dates of flight and prices and carry the legend

"FOR VOYAGER MEMBERS ONLY".

Usually a secondary message is carried to the same effect. Occasionally notices are in the paper to Voyager members reminding them to sign up for the next party if they want to attend. The style of Voyager advertising has changed little in the past several years. When Voyager officials were in Kansas City discussing with the FAA Regional Counsel the question of carrying guests, Voyager's advertising and promotion program was mentioned. FAA counsel found no fault with the advertising and made no suggestions.

The contention that Voyager's publicity was directed to

the public generally to invite them to fly Voyager as if it were a commercial enterprise is not supported by substantial evidence. Judge Madden said in his initial decision, as quoted by the Court of Appeals:

> "The Bureau reads the advertising program as being directed to members of the public generally and as inviting them to fly Voyager as though it were a commercial enterprise * * *.
>
> "The respondents deny that this was the purpose, either overt or covert, and the evidence sustains them. The adds [sic] clearly stated that the trips were available only to Voyager members. Insofar as their placement was part of a campaign to increase the membership that was the exercise of a legitimate right as long as the original purpose of the club was not being changed. The listing of prospective flights and the costs can be fairly read as an effective device to illustrate the advantages of being a member. It was certainly effective as part of the expansion plan. If in its concept Voyager was a private club engaging in private carriage, as it clearly was, simply increasing the number of members does not add an insidious noted [sic]." (Exhibit C, pages 92-93)

Any information on specific flights is directed exclusively to Voyager members—the only people who may participate. While the ads may interest prospective Voyager members in joining the club, they are not designed to sell individual flights to members of the public and, as a practical matter, do not do so. The concept portrayed in the ads of traveling with other members of a private club to exotic and mysterious destinations is meant only to make prospective members aware of what the club does. The finding that the advertising was designed to reach and attract those who were not already members does not establish a violation of the Act. As the Supreme Court said in *United States* v. *Contract Steel Carriers, Inc.*, 350

U.S. 409, 76 S.Ct. 461 (1956), as long as the advertising is aimed at legitimate targets, it cannot be faulted for being aggressive and bold.

There is absolutely no evidence in the record that Voyager advertising caused one passenger to divert from a common carrier flight. In fact, the CAB and the Court of Appeals just *assume* that Voyager is illegally hurting someone in the transportation marketplace. See, for example, footnote 16 in the CAB's opinion (Exhibit B, page 72) and the Court of Appeals' decision (Exhibit C, page 86). An analysis of destinations and elapsed time by common carriers and by Voyager shows Voyager is not in competition with any airline or with any travel agents. The club officers established a policy of trying to think of destinations that would be novel, out of the ordinary, and mysterious, with a heavy emphasis on the short weekend-type trips. Taking a typical month, November, 1971, an officer of Voyager found that of 17 planned trips, 15 were to different destinations. Fifteen were weekend flights departing Indianapolis Thursday or Friday (except Thanksgiving week when the departures were Wednesday) and returning Sunday. There is no attempt by common carriers, scheduled or supplemental, serving Indianapolis, to meet this unique and novel demand. Out of the 17 trips Voyager flew that month, only two were to destinations advertised by the travel agents. In conversations with travel agents, the officer found that Voyager's elapsed time was less than half that of the best common carrier service in five of eight examples. The travel agents and airlines in Indianapolis just do not serve the same market that Voyager has developed, and Voyager should not be brought under the economic jurisdiction of the CAB which is reserved for those common carriers.

All this should not have been lost on the Court of Ap-

peals. Indeed, footnote 13 of the Court's opinion (Exhibit C, page 90) is a fitting tribute to what should be a recognition that you can't haul a private club into court for violations of § 401(a) of the Act unless there is competition with individually-ticketed services. The footnote says this:

> "The court's [Court of Appeals for the Second Circuit] [sic] analysis quite properly demonstrated the limitations on the Board's affirmative statutory duties. The desired result is not to remove all operations which compete with commercial airlines but rather to regulate only those operations which affect the economic soundness of regularly scheduled point-to-point air transportation. The economic stability of commercial airlines is to be preserved not for the benefit of the airlines *per se* but only insofar as that stability is necessary to the maintenance of an adequate national and international transportation system."

So, why didn't the court practice what it preached? The reason is based on the CAB's and the Court's apparent ideas concerning Voyager's growth: the second thing about Voyager that evoked the CAB's wrath. The Court's opinion seems to rest on the unsupported premise that Voyager membership is undifferentiated from the traveling public at large. Yet, Voyager has all the indicia of private carriage listed above under the second reason for granting a writ of certiorari. See pages 14-15 above. In particular, the initiation fee and monthly dues amount to a substantial investment by people interested in participating in a travel club, and the evidence is undisputed that members cannot fly, cannot attend parties, and cannot vote unless their dues are paid. Moreover, any contention that members sign up for one flight and then drop out of the club is totally unsupported, as Judge Madden found. (Exhibit A, pages 45-46) A computer check of Voyager's records, the only evi-

dence on this point, shows that only 216 members dropped out over a period of nine months in 1971 for delinquency in payment of dues, and during this period 3,840 became members. The Bureau of Enforcement also charged that on numerous occasions new members paid the fees necessary to join Voyager and their air share of a flight at the same time, but a survey of Voyager's members showed that the average time between joining and traveling was 5½ months.

So, what we are apparently left with is the conclusion that Voyager *is* the general public. In other words, Voyager is so large that a flyer to the membership or a newspaper notice to the membership is really a flyer or notice to the general public. Voyager had about 14,500 memberships when the complaint was filed, and a membership generally allows a family to participate in club activities. Is that so many people that providing travel incident to club membership in Voyager is per se a solicitation of the "public"? The CAB has never gone so far as saying that a private club automatically becomes a segment of the general public where the number of memberships is only 14,500.*

If Voyager *is* the general public, when did it become so? Surely not at 50 members. At 5,000? The CAB did not so much as make a whisper until Voyager reached 14,500 memberships. Yet, where does the CAB draw the line? All these questions are, of course, unanswered by the CAB and by the Court of Appeals, probably because neither body has given an acceptable reason of how and when Voyager passed from private carrier status to that of a common carrier. The fact is that Voyager is far from the point

* The CAB found that a membership of 140,000 was not per se a segment of the general public in the *Transamerica* case. CAB Order 69-5-124.

where solicitation of its membership would be a per se solicitation of the general public.

Because the program Voyager members have built has been successful and has attracted the attention of significant numbers of members, the CAB has, after nine years, taken upon itself the job of dismantling the club. In so doing, the CAB disregarded the meticulous findings and conclusions of its own hearing examiner, as well as the common meaning of the Act. Similarly, the Court of Appeals has issued what Voyager—and all travel clubs—consider an unfair, unjust, and not legally supportable decision. A writ of certiorari should be granted to correct the error.

## CONCLUSION

There are over thirty air travel clubs in the United States, clubs that have operated for many years under the belief that a private air travel club with a bona fide membership is not a common carrier subject to the CAB's economic regulation. That belief was bolstered by the acquiescence of the CAB and of its sister agency, the FAA. The CAB has never sought to regulate air travel clubs. Now the CAB has changed its mind: private air travel clubs *are* common carriers, says the CAB, and they can no longer operate. The Voyager 1000 club in Indianapolis was the first club against which the CAB moved, but it won't be the last.

Voyager is asking this Court to issue a writ of certiorari so that its membership can fully test the unprecedented action of the CAB and the decision of the Court of Appeals enforcing it. Voyager and the numerous other travel clubs in this country would like to receive a definitive answer to a question that has never before been asked (let alone answered): Is a private air travel club, with all of Voy-

ager's indicia of private carriage, a common carrier of passengers that must obtain CAB certification under § 401(a) of the Federal Aviation Act of 1958?

The United States Court of Appeals for the Seventh Circuit has decided, Voyager believes erroneously, an important question of federal law which has not been, but should be, settled by this Court. Accordingly, a writ of certiorari should issue to review the order and opinion of the United States Court of Appeals.

Respectfully submitted,

KARL J. STIPHER
CHARLES T. RICHARDSON
810 Fletcher Trust Building
Indianapolis, Indiana 46204
*Counsel for Petitioners*

**EXHIBIT A**

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Issued under delegated authority

| | |
|---|---|
| VOYAGER 1000<br>ADAM RUECKERT, Individually<br>ROBERT J. FINK, Individually<br>A. LEE CLIFFORD, Individually<br>*Respondents*<br>Enforcement Proceeding | Docket 23991 |

ORDER

A full public hearing having been held in the above-entitled proceeding and the examiner, upon consideration of the record, having issued an initial decision containing his findings and conclusions, which is attached hereto and made a part hereof, pursuant to authority delegated to hearing examiners under Rule 27 of the Rules of Practice in Economic Proceedings;

IT IS ORDERED:

1. That the petition for enforcement and the complaint in the above-entitled proceeding be and they are hereby dismissed.

2. That this order shall become effective as the final order of the Board on the 31st day after the date of service of this order and the initial decision unless a petition for discretionary review is filed within 21 days after service in accordance with Rule 28 of the Rules of Practice in Economic Proceedings (14 CFR 302.28) or the Board issues

an order to review upon its own initiative. If a petition for discretionary review is timely filed or if action to review is taken by the Board upon its own initiative, the effectiveness of this order shall be stayed until further order of the Board.

WILLIAM J. MADDEN
*Hearing Examiner*

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

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|---|---|
| VOYAGER 1000<br>ADAM RUECKERT, Individually<br>ROBERT J. FINK, Individually<br>A. LEE CLIFFORD, Individually<br>*Respondents*<br>Enforcement Proceeding | Docket 23991 |

Initial Decision of WILLIAM J. MADDEN, *Hearing Examiner*

Served: June 22, 1972

Upon:

*Harry Bowen,* 1110 O.F.C. Building, 1730 Rhode Island Avenue, N.W., Washington, D. C. 20036 for Voyager 1000 and other Respondents.

*Peter C. Edison,* 1875 Connecticut Avenue, N.W., Washington, D. C. 20428 for the Bureau of Enforcement.

This initial decision is rendered pursuant to the authority delegated to examiners under Rule 27 of the Rules of Practice of Economic Proceedings. It becomes effective as the final order of the Board 30 days after service thereof unless a petition for discretionary review is filed within 21 days after service thereof in accordance with Rule 28 or the Board issues an order within said 30-day period to review upon its own initiative. If a petition for discretionary review is timely filed or action to review is taken by the Board upon its own initiative, the effectiveness of this final decision is stayed until further order of the Board.

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

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|---|---|
| VOYAGER 1000<br>ADAM RUECKERT, Individually<br>ROBERT J. FINK, Individually<br>A. LEE CLIFFORD, Individually<br>*Respondents*<br>Enforcement Proceeding | Docket 23991 |

Found that Voyager 1000 was founded as a private club to provide transportation for its members as a private carrier; that it has operated in this concept; that despite the expansion of the membership from that originally planned it has not verged from the original concept and has not moved into a status of common carrier. Petition for enforcement and the complaint dismissed.

APPEARANCES:

*Harry Bowen* for Voyager 1000 and other Respondents.

*Peter C. Edison* and *T. Christopher Browne* for the Bureau of Enforcement.

## INITIAL DECISION

The basis of this proceeding is a complaint docketed by the Director of the Bureau of Enforcement which contends that Voyager 1000 while represented as a private membership flying club is in fact an air carrier offering and providing air transportation for the general public. As an air carrier it would be required under Section 401(a) of the Federal Aviation Act of 1958 to obtain from the Board a

certificate of public convenience and necessity authorizing it to engage in air transportation.[1]

Voyager 1000 and the individuals also designated as respondents contest the complaint in general and contend that the facts upon which the Bureau of Enforcement relies fail to establish that Voyager is a common carrier. On the contrary they contend that the activities of Voyager must be construed as private carriage and therefor not covered by the certificate requirements of section 401. The activities in which Voyager engages and the manner in which they are carried on, to the extent that they have a bearing on the disposition of this case, are as follows.

*Background and Formation*

As originally conceived Voyager was to be a private flying club with a limited number of members that would acquire its own transport type aircraft to be used for recreational travel by the membership. The plan was to have ten people advance about $1,000 each and establish a fund necessary for the downpayment on an aircraft which would be acquired as the first step in attracting members. These 10 and 15 others which did not make cash contributions constituted the founding members. Total membership was to be 1,000 each of whom would pay an initiation fee and monthly dues.[2] Membership reached 1,000 within the first

[1] Section 401(a) recites "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation." The remaining subsections of section 401 prescribe the manner in which the certificate should be sought, eligibility requirements, terms and conditions, and the various responsibilities imposed upon the holder.

[2] The record is not precisely clear as to whether each of the first 1000 members actually paid an initiation fee or the amount. The fee was the subject of some variation in the early years, being stated at $125, and $200 for family membership, at one point being waived in some instances and under some circumstances, and eventually being established

year and since there were additional candidates it was decided to establish a second club to be called Voyager 2000.

The company was qualified as a nonprofit corporation under the laws of Indiana in September 1964. Subsequently the second club was merged into the first and the memberships were consolidated. At the present time membership in the club is achieved through a printed application form, a copy of which is attached as Appendix 1. As will be noted the form contains a blank indicating by whom the applicant is recommended and space for noting the action of the membership committee. Despite this indication of a screening the essential qualification for membership has been payment of the initiation fee, when applicable, and dues.

*Financial Emergency—Expansion of the Membership.* Toward the end of 1967 there were approximately 2,200 members. A more accurate count as of May 14, 1968 showed 2,460 of which 2,100 were in good standing. At about this time the club found itself in a tight financial situation. Cash was seriously depleted, deposits for trips on flights yet to be operated had been spent, dues collected to that point had been spent, some members were demaning refunds for cancelled trips and Shell Oil Company was insisting on the return of its credit card. Emergency steps were taken to build up some cash resources against the more pressing liabilities. Some of the Board members made personal loans which provided a $21,000 fund and an engine impound fund on deposit was diverted to the extent of $25,000.

These steps helped with the immediate cash emergency but a more significant step of longrun assistance was a

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at $10, the amount which is now in effect. The amount of monthly dues also varied but it now appears to be stabilized at $7.00.

change in policy as to the number of members. It was decided that the club could not survive on a membership in the range of 2,000 and that regular dues payments by a much larger membership would provide the best prospect for building up an adequate operating fund. To this end it was determined to embark upon a drive for new members with an initial goal of 5,000. In September 1970, the goal was increased to 20,000.

The membership drive took a number of courses. Among them was a series of "open houses" which were advertised in newspapers in Indianapolis, Cincinnati and Louisville. A number of such gatherings were sponsored in early 1958 at the club headquarters in Indianapolis, and in Louisville, Fort Wayne, Evansville and Terre Haute, Indiana, and Columbus, Ohio. Another was the preparation of special articles about the club for publication in area newspapers and magazines of general circulation such as Time and Travel Weekly. "Bonus memberships" were given to existing members for distribution or sale, if possible. The sum of $10 in scrip was credited to the member for each bonus membership which resulted in a new member with the scrip redeemable in Voyager services. As of May 1, 1969, new members produced by bonus membership stood at 1,600 and were averaging 25 new members per day. As of February 1972, current liabilities of the club included $93,000 as flight scrip.

Another avenue pursued to increase membership was the investigation of possibilities of merging with other similar clubs. While there were some discussions and some overtures in this direction toward similar clubs in Chicago and Detroit no acquisition was accomplished.

When the club acquired the Boeing jet it utilized it in a new-member program with published invitations to inspect the aircraft on weekends. In the period from June to Sep-

tember 1970 these announcements included a description of the club and its activities and particularly stressed that during this period the initiation fee of $200 would be waived and the only financial outlay would be payment of dues for the first six months.

Early in 1971 a special student membership drive was conducted under which college students could join Voyager for a 12 month period for a fee of $10. This was broken down into a $5 initiation fee and a flat rate of $5 for annual dues. A promotion of this plan was undertaken at Purdue University, Ball State Teachers College and Marion College. Part of this promotion was the offering of free flights for those enrolling student members.

Accompanying these specialized efforts for attracting new members was a continuing reliance on the advertisement of the club's flight program in mailings to the membership of the club's flight program in mailings to the membership and in newspapers in Indianapolis, Cincinnati and Louisville. Samples of newspaper ads are attached as Appendix 2. It will be noted that they contain a notice that the flights are for members only but they also carry an invitation to inquire about membership and most of them contained a coupon which could be used for the inquiry. A number of them stated the cost of becoming a member and emphasized the fact that dues were at the rate of only $6.00 a month.

As a result of the various promotions the number of memberships increased from 2,400 in the latter part of 1968 to 14,500 by December of 1971. Since most memberships are "faimly" this reflects an estimated 43,000 prospective travelers. In the first nine months of 1971, 216 memberships were dropped.

*Management and Ownership*

As mentioned earlier the originating group consisted of 25 so-called founding members. The by-laws provide for an 11 man Board of Directors, five elected by the founding members and six by the general membership. They are elected for a three-year term but the terms are staggered, three being elected in each of three successive years and two in the fourth. If a vacancy occurs the remaining directors fill the vacancy but the designated member serves only till the next annual election.

The by-laws also prescribe the method to be followed in nominating and electing the directors. In October of each year the president appoints two nominating committees, one comprised of founding members to provide candidates for the founding member vacancies and another to propose candidates from the general membership. It has been the practice to designate general membership members to the committee to propose candidates for the general membership vacancies. These candidates may also be founding members.

Election is at the annual meeting which must be held in December. Originally the by-laws required that the election for directors must reflect attendance at the annual meeting, in person or by proxies, of at least 50 percent of the membership. Accomplishing such an attendance was a difficult task after the club was well-established, necessitating a lot of canvassing by interested members, stressing particularly the use of proxies.

While a majority of the directors must be elected by the general membership the policies and the programs of the club reflect, for the most part, the determinations of the group of founding members on the Board of Directors. There has been only one instance in which the directors as proposed by the nominating committees were not elected

by the members. In this instance a general membership candidate proposed by the nominating committee lost at the election but only after an intense and expensive proxy fight.

As an Indiana nonprofit corporation there is lacking on the part of the members the element of tangible ownership that is present as to the stockholders of a corporation organized for profit. The Indiana corporation act expressly provides that upon dissolution of such a company any tangible assets over and above those required to pay off all debts, including those that may be owing to members, shall escheat to the state. The Act also contains a prohibition against any returns to officers or directors other than for monies advanced or service actually performed.

*Operation of the Club.* Voyager employs 86 individuals, 22 in operations, 20 in maintenance and the balance are office employees taking care of matters such as planning, reservations and finances. They are under the direct supervision of a general manager and he looks to an executive committee for guidance on major decisions and policy matters. This committee in turn reports to the Board of Directors. Flight operations are conducted by pilots employed directly by the club and the in-flight duties are performed by a crew of professional stewardesses.

*Flight Equipment.* The first aircraft acquired by the club was a DC-7 which was purchased in January of 1965 for $75,000. It was financed by a downpayment of $25,000 with the balance to be paid in 12 monthly installments. A second DC-7 was acquired later and in May 1970 the club added a jet to its fleet, a Boeing 720-125 which was purchased from the manufacturer for $1,700,000. Two Lockheed Electra units were added to the fleet in March 1971

at a cost of $1,350,000. The Boeing is configured to seat 155 passengers and the Electras 117 each.

*Compliance with FAA Regulations.* In September 1968, the Federal Aviation Administration adopted Part 123 of the Federal Aviation Regulations which was directed specifically to cover operations of air travel clubs with large airplanes. This regulation provides for the issuance of an operating certificate similar to that which the Administration issues to air carriers certificated as such by the Board. The certificate is granted only after the flying club demonstrates that it has met the requirements spelled out in Part 123. These requirements are similar to those established for a scheduled airline covering as they do qualifications of the personnel, aircraft, navigation, equipment, the maintenance of manuals and periodic inspections. The regulation defines an air travel club for its purpose as "a person who engages in the carriage by airplanes of persons who are required to qualify for that carriage by payment of an assessment, dues, membership fee, or other similar type of remittance."

Voyager qualified to operate under Part 123 and presently holds operating certificate no. CE-14 (T.C.). It has always maintained close contact with the representatives of the Federal Aviation Administration and on occasion it solicited information and advice on matters other than those relating to the operating requirements of Part 123. One such instance was an inquiry as to the propriety of permitting members to bring guests on club flights, a plan which was under consideration. It was directed first to the FAA representative at Indianapolis who in turn suggested it be discussed with the regional counsel at Kansas City. This was done, the advice was negative and the plan was abandoned. Voyager also was informed on occasion by the FAA of somewhat similar determinations which arose as

a result of inquiries by other clubs, these included an answer to a question as to the propriety of a business establishment buying memberships for employees (the answer to that was qualified but mostly negative) and whether it would be proper for a travel club to carry prospective members on promotional or demonstration flights.

*Flight Programming.* The flight programs are planned well in advance and the announcement of flights cover a five to six months period. There is a heavy emphasis on the short weekend type and destinations which are considered novel and unique. For example the November 1971 program consisted of 17 flights, of which 15 were weekend departures from Indianapolis on Thursday or Friday, returning on Sunday. Included were trips to the following points.

| | |
|---|---|
| Lake Tahoe | Puerto Vallata |
| La Paz | Andros Island |
| Conzumel | Grand Cayman |
| Panama City | Barbados |
| Great Exuma | Marathon |

Illustrative of the flight planning is a mailing to the members in May 1971, setting forth the flight program for the months of June through October. A copy of this document is attached at Appendix 3. The flights are patronized almost to capacity and in the 12 months preceding the hearing 24,000 members were carried.

It will be noted from Appendix 3 that precise prices per person are stated and that in some instances the price is all-inclusive and in others the cost of the air and ground packages are stated separately. At this stage in the club's development the amounts reflect in a high degree prices quoted for similar trips under previous programs. In its earlier years prices were related to some extent to a base

rate of approximately two cents per passenger mile. This figure was borrowed from what the founders understood to be the rate another similar club was using. At the present time the air fares average about 3½ cents per passenger mile but there are many variations and no effort is made to prorate the cost of any trip among the participants.

*Activities Other Than Travel.* Respondents concede that recreational travel on Voyager flights is the dominant purpose of the club but they make a point of a social aspect. The club plans and conducts a program of parties for members with each party emphasizing a travel theme. Flyers listing them are sent to the members and in many cases they encourage members to bring guests. A typical announcement is one listing a series of gatherings at approximately weekly intervals during February, March and April 1971, at the Airport Holiday Inn in Indianapolis. The flyer includes a reservation form since the practice is to limit the number of those attending to 250. On some occasions the flyers mailed to members are combination announcements of trips and social gatherings.

*Flights Carrying Other Than Members.* In the complaint that accompanied the petition for enforcement, the Bureau refers to three instances in which Voyager appeared to hold itself out as providing transportation for other than *bona fide* club members. The instances consist of flights operated to Fort Lauderdale for the convenience of university students during the Easter recess; a flight to Hawaii for the Indiana National Guard Association and a flight to Jamaica for a Dayton group identified as the Trailsend Club. The Fort Lauderdale flights for the University students were provided at the time of the student recruitment program mentioned earlier. There were two

planeloads and the flights were considered as a one-time program.

The flight operated for the convenience of the National Guard Association was set up for this purpose after a representative inquired of Voyager if they could be accommodated. He was advised that the participants would also have to be members of Voyager but after some discussions a special fee arrangement was made whereby they could join Voyager at 50 percent of the normal annual cost. A flight to accommodate the Association under this arrangement was fitted into the club's schedule and it was also available to regular club members.

The members of the Trailsend Club were carried to Jamaica on a flight planned in the regular course for Voyager members. As in the case of the flight accommodating the National Guard Association, the Trailsend participants joined Voyager for the purpose of making the particular flight but it does not appear that a special fee arrangement was made in this instance. Approximately 48 Trailsend members took the flight.

*Present Financial Status.* The most recent income and expense statement in the record covers the 12 months ended September 30, 1971. For that period operating income is listed at $4.3 million with the major contributions coming from flight trips at $2.5 million, ground packages at $860,000 and dues payments at $886,000. Complementary expense items were flight expenses at $1.3 million and ground packages at $1.2 million. Aircraft maintenance was listed at close to $1.0 million and remaining items brought the total to $4.6 million and an operating loss of $225,000. This was increased to $400,000 by "other" expense items.

The club's balance sheet at of February 29, 1972, is summarized as follows:

## ASSETS

| | |
|---|---|
| **Current Assets** | |
| Cash Accounts | $ 680,000 |
| Inventory | 245,000 |
| Other Current | 254,000 |
| Total Current Assets | $1,179,000 |
| **Fixed Assets** | |
| Aircraft and Engines (net) | $2,744,000 |
| Other | 73,000 |
| Total Fixed Assets | $2,817,000 |
| **Total Assets** | $3,996,000 |

## LIABILITIES AND NET WORTH

| | |
|---|---|
| **Current Liabilities** | |
| Deferred Trip Payments | $1,218,000 |
| Flight Scrip | 93,000 |
| Accounts Payable | 86,000 |
| Taxes | 122,000 |
| Notes Payable | 111,000 |
| Current Long-Term Debt | 316,000 |
| Total Current Liabilities | $1,946,000 |
| **Long-Term Liabilities** | |
| Contract Payable (Aircraft) | $2,250,000 |
| Net Worth | (200,000) |
| **Total Liabilities and Net Worth** | $3,996,000 |

## POSITION OF THE BUREAU

The position of the Bureau is that Voyager while nominally a private flying club operates, as a common carrier within the accepted legal understanding of this term and thus its activities constitute those of an air carrier engaged in air transportation which requires a certificate under Section 401(a) of the Act.[3] The Bureau concedes that if Voyager's operations can reasonably be construed as private carriage they are outside of the jurisdiction provided to the Board by the Federal Aviation Act. The remedy which the Bureau seeks is an order directing Voyager to cease and desist from its current operations unless and until the Board grants its approval of such operations by the award of a certificate under section 401(a) or by an exemption under section 416(b).

*Facts Constituting Voyager as a Common Carrier.* The Bureau's conclusion that Voyager must be found to be a common carrier is based upon an overall appraisal of its operations with a particular focusing on those features of the operation which constitute a "holding out" of transportation to a segment of the general public.[4] The holding

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[3] The Act does not define a common carrier as such but the term appears as part of the definition of air transportation which is defined in section 101(21) as *** the carriage by aircraft of persons or property as a common carrier for compensation or hire ***. This definition of air transportation is in turn employed as part of the definition of air carrier in section 101(3): "Air carrier" means any citizen of the United States who undertakes, whether directly or by a lease or any other arrangement, to engage in air transportation.

[4] The Bureau relies for a definition of a common carrier as appropriate to be used in this case one which the Board reached in the Pan American Ferry Flight Case, 18 C.A.B. 214 (1953), *viz.*, "*** one who holds himself out as ready and willing to undertake for hire the transportation of persons or property from place to place and so invites the patronage of the public". Particular note is made of the fact the Board found that it was not necessary that the holding out be to the entire public; that a segment of the general public is sufficient.

out to the general public is established by the extensive advertising program upon which Voyager engages, including as it did insertions in eight newspapers with a combined circulation exceeding one million readers, a full page advertisement in Holiday Magazine, a series of radio ads and direct mail campaigns. The Bureau can not accept Voyager's interpretation of these advertisements as announcements to members coupled with invitations to join Voyager. Fortifying this aspect of the Bureau's conclusion is the surge in the number of members that took place after 1968; from the 2,000-2,400 range of the first five years to 14,500 within the last two.

The membership aspect of the advertising campaign is untenable and irrelevant in the Bureau's view, in part because of the extensive listing of specific flights with dates and prices, in part by the fact that the flights are available to new members immediately upon joining and in part to the minimal screening, beyond payment of fees and dues, of prospective members. The Bureau considers the Voyager membership concept as nothing more than a paper device employed by those in control of Voyager to evade the regulatory responsibilities imposed upon air carriers and the Board by the Act.

*Small Group Control vs. Membership Control.* The Bureau considers Voyager as being currently controlled and operated by a self-perpetuating Board of Directors and in no significant degree by the general membership. It sees it as a tightly controlled operation depicting many of the aspects of a management controlled air carrier. The Bureau's conclusion in this respect is fortified with a reference to the fact that members generally have expressed no interest in the operations of the corporation and appear to have joined Voyager solely for the purpose of obtaining low cost air transportation. The Bureau also emphasizes

what it considers an insufficient economic investment in Voyager's assets to set them apart from the general public. The Bureau regards as nominal the presently established initiation fee of $10 and monthly dues at the rate of $7.

## POSITION OF THE RESPONDENTS

The respondents contest the Bureau's claim that it is in fact a common carrier and insist that Voyager is a private club, with the necessary attributes and therefore it must be considered a private carrier in its transport operations. These attributes include its organization as a nonprofit corporation, a membership voice in the management, the social aspects, dues payments, outright ownership of the aircraft and the common interest in recreational travel.

In countering the Bureau's claim that it is a common carrier they refer to a number of Board precedents in which aspects similar to those exhibited by Voyager were absent resulting in a finding that common carrier status had been established. Among these is the so-called *Transamerica Case*,[5] in which aproximately 145,000 stockholders were not considered as constituting an affinity group because status as a stockholder was the only common interest. Voyager's much smaller number of members (although the number was not of itself a principal factor in Transamerica) plus the various private club aspects of the Voyager membership distinguishes the instant case from Transamerica.

The respondents also make a point of the efforts from the beginning to abide by all applicable laws and regulations bearing on air transportation operations, noting par-

[5] In this case Trans International Airlines, Inc., a supplemental carrier sought an exemption which would permit it to operate a number of affinity charters comprised of stockholders of Transamerica, the parent company of TIA, Order 69-5-124.

ticularly the compliance with Part 123 of the FAA regulations in the adoption of which they were active participants and their cooperation with the representatives of the Board when the Bureau made its first inquiries as to the nature of their operations in the latter part of 1971.

Should the ultimate decision be that Voyager is engaged in air transportation and should be brought under the economic regulatory jurisdiction of the Board the respondents ask for ample time and opportunity to achieve compliance. They point to the serious situation that would arise in the event of a precipitate requirement to cease operations. Illustrative is the present cash position of the club which while adequate for a continuation of operations as presently conducted would be woefully inadequate against a sudden liquidation requirement.

## FINDINGS AND CONCLUSIONS

In its concept and in its operation at least through 1968, Voyager was a private club engaged in private carriage under any reasonable legal measurement. It originated with a relatively small group with a common interest in recreational travel and in a plan to provide, with their own facilities, roundtrip flights of durations and to destinations and at costs not generally available on the commercial services. In effectuating such a plan, Voyager was in a clear posture of privacy—as a club and as a carrier—not subject to the economic regulatory aspects of the Federal Aviation Act of 1958.

The record will not support a contention that the managers of Voyager, from its inception to its present status, have acted otherwise than in good faith to carry out the basic plan. Similarly it will not support a contention that there was any intent on their part to evade or avoid compliance with any applicable laws. Insofar as the operation

required the sanction of the FAA they assiduously sought to achieve full compliance and they took an active part in the rulemaking proceeding which produced Part 123. In the one instance when a question of a legal nature arose as to the club's right to be covered by Part 123 they sought and obtained advice of legal officers of the FAA.

While they made no comparable inquiries as to whether the activities of Voyager should be sanctioned by the Board as to the economic aspects there is no hint of any purpose to avoid such compliance had it been necessary. Insofar as the actions which the Bureau construes as establishing a common carrier status are concerned they were not taken surreptiously but on the contrary they were open and notorious. When the Bureau conducted its investigation of the club's activities it was extended full cooperation and given access to all pertinent records.

The Bureau's case rests for the most part on developments that followed the decision to expand the membership when it became apparent that the club could not survive, financially, in the first concept of a small group. Those of consequence to disposition of the complaint are the advertising program (a holding out), and the minimal qualifications and the new size of the membership (a segment of the public). The Bureau reads the advertising program as being directed to members of the public generally and as inviting them to fly Voyager as though it were a commercial enterprise. It is in this posture the Bureau views the extensive listing of flights and the details thereof, particularly the quoted prices.

The respondents deny that this was the purpose, either overt or covert, and the evidence sustains them. The ads clearly stated that the trips were available only to Voyager members. Insofar as their placement was part of a campaign to increase the membership that was the exercise of

a legitimate right as long as the original purpose of the club was not being changed. The listing of prospective flights and the costs can be fairly read as an effective device to illustrate the advantages of being a member. It was certainly effective as part of the expansion plan. If in its concept Voyager was a private club engaging in private carriage, as it clearly was, simply increasing the number of members does not add an insidious noted.

The Board has heretofore directed attention to the use of advertising in newspapers of general circulation directed to members of particular groups and their families. Since they were so restrictively directed the advertisements were not considered as solicitation of the general public (*Eastern Airlines, Inc.* v. *TIA*, E-21440). While Voyager directed them to prospective members there was an element of selectiveness in that they were addressed to persons travel-minded in the manner of the original Voyager members.

The so-called ease of membership upon which the Bureau places some reliance to establish "general public" has not been sustained. While it is true that there is little or no screening of an applicant beyond the payment of initiation fee and dues there is a built-in screening by the mere fact of application for membership. By such application, particularly after exposure to explanations of the purposes of the club, an applicant, inferentially but effectively, declares an affinity with the existing members.

Also important in judging ease of membership is the financial outlay. Despite the Bureau's regard of the payments as nominal the sum is real and substantial. The complaint contains an allegation that in a good number of cases persons join only to participate in a particular trip and then abandon membership. The allegation went so far as to estimate that 40 to 50 percent drop out after one flight.

There is no factual basis to sustain this allegation. A check by the respondents of such activities following the filing of the complaint revealed the figure of 216 drop-outs in the first nine months of 1971 when 3,840 became members.

The real and substantial character of the dues is especially clear when measured by the yearly amount and remembering that it is paid year in and year out. It is even more clear when considered in the aggregate. In the year ended September 30, 1971, dues produced $886,000, close to one-quarter of the total operating income.

There are two other aspects of the club and the way which it is run to which the Bureau calls attention in support of its position *viz.*, alleged continuing control by the founders or their designees, and a lack of interest on behalf of a great number of the members in the direct operation and the planning of flights. It is not quite clear wherein these aspects, assuming that they exist to the degree claimed, tend to support the Bureau's case.

The Bureau expresses its evaluation of the mangement as a self-perpetuating Board of Directors. It is a fact of life that there is a tendency in all corporations, whether for profit or not for profit, for the management to maintain its managerial status. Also typical of corporations of appreciable size is the tendency of the majority of stockholders (or their counterpart as members in organizations such as Voyager) to have little interest in management and operation as long as the end results are satisfactory and are what they contemplated at the time they bought into the company or joined the organization.

In taking the overall view of the activities of Voyager in reaching the conclusion that common carrier status has been established the Bureau does not pursue on brief the instances charged in the complaint and referred to earlier

in which persons other than *bona fide* members of the club may have been carried on flights. While there are elements of questionable practice in each of the three that have been described there were extenuating circumstances related to the more desperate days in the club's development. In any event they do not establish the existence of a course of conduct toward such practices on the part of the respondents. It does not appear necessary at this point of the club's development to select them out for specific prohibition.

On the basis of the foregoing findings and conclusions and all the facts of record it is found that Voyager 1000 at the outset was intended to be a private club providing transportation for its members in a capacity of a private carrier; it has operated in this concept and despite expansion of the membership from that originally planned it has not verged from its original concept and has not moved into the status of common carrier. Accordingly it is not an air carrier within the meaning of the provisions of Section 401(a) of the Federal Aviation Act of 1958.

The complaint will be dismissed. An appropriate order is attached.

WILLIAM J. MADDEN
*Hearing Examiner*

June 16, 1972

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VOYAGER TERMINAL, WEIR COOK AIRPORT, INDIANAPOLIS, INDIANA 46241
Phone: 317-247-6221

## MEMBERSHIP APPLICATION

(PLEASE PRINT)

CHECK ONE: HUSBAND & WIFE ☐ SINGLE ☐

NAME_____ AGE_____ WIFE_____ AGE_____

ADDRESS_____ PHONE_____

CITY_____ STATE_____ ZIP CODE_____

OCCUPATION_____

TITLE_____

COMPANY_____

BUSINESS ADDRESS_____ PHONE_____

Application is hereby made for membership in Voyager 1000 Inc., a non-profit corporation in accordance with the articles and by-laws. Enclosed is my check for $31 representing my payment for: My $10 initiation fee; first three months dues (if within 100 miles of Indianapolis); six months dues (from 100 to 200 miles of Indianapolis); full year dues (more than 200 miles from Indianapolis. I understand that at the expiration of this first paid-up period, I will be billed in advance for a similar time period.

*Please charge my BankAmericard Account No.* _____

*Master Charge Account No.* _____

CHILDREN MEMBERSHIP

NAME:_____ AGE:_____ BIRTH DATE:_____
NAME:_____ AGE:_____ BIRTH DATE:_____
NAME:_____ AGE:_____ BIRTH DATE:_____
NAME:_____ AGE:_____ BIRTH DATE:_____
NAME:_____ AGE:_____ BIRTH DATE:_____

Any child 21 years of age or younger living at home is automatically included on your membership. There are no additional monthly dues for these children.

SIGNATURE_____

RECOMMENDED BY:_____ (IOM No._____)

ADDRESS_____

---------- FOR OFFICE USE ONLY ----------

MEMBERSHIP COMMITTEE ACTION: APPROVED_____ CHECK NO._____
DISAPPROVED_____ AMT. OF CHECK_____
DATE OF ACCEPTANCE BY COMMITTEE_____

IOM NUMBER_____ ACKNOWLEDGEMENT SENT_____
CERTIFICATE_____ CERTIFICATE & CARDS SENT_____

Indianapolis Star
July 26, 1970

## VOYAGER TRIPS COMING UP

**Attention VOYAGER members**

To help you plan your schedules for the month of August, we are listing four trips that deserve your special consideration.

**Aug. 6-10**

VOYAGER Anywhere

Reno Fun Flights (2)—Depart at 6 A.M. Flt. 414 or 8 A.M. Flt. 2414..... $169.50
(Take your choice)

All of the excitement and glamour of one of the U.S.A.'s most exciting cities, and one of our greatest ground packages ever.

**Aug. 7-9**

TORONTO ZIP TRIP—Flt. 446 (includes air and ground)..... $72.50

**Aug. 11-16**

SAN FRANCISCO or DENVER

Flight to San Francisco..... $140.40

Flight to Denver..... $70.20

Ground Packages: Denver $75.00
San Francisco $87.00

**Aug. 25-30**

MIAMI, FLA. —Flt. 453 Fly to Miami and Return — ..... (per person) $74

Two great spots to "get away from it all."

**SORRY VOYAGER MEMBERS ONLY**

For details call 241-9313 or send coupon below

Voyager 1000, Weir Cook Airport, Indianapolis 46241

Gentlemen: I understand there is now a limited number of memberships available. Kindly send information.

ADDRESS ..... CITY ..... ZIP .....

NAME ..... PHONE .....

Indianapolis Star
August 2, 1970

## DON'T READ THIS AD

**(Unless You're a VOYAGER 1000 Member)**

This ad contains a listing of several special trips available to members of VOYAGER 1000—the world's most successful travel club.

**Aug. 7-9** — VOYAGER members
**TORONTO ZIP TRIP—Flight 445**
Enjoy three days in one of the country's most exciting cities. Price includes Air-plus-Air transportation, night life, meals at the finest restaurants, deluxe hotel, flight insurance and taxes. — $72.00 per person

**Aug. 16-19**
**LAS VEGAS SPECIAL—Flight 460**
Spend four days on the continent and glitter on the World's gayest pleasure ground. — $[illegible] per person, optional ground package plus [illegible]

**Aug. 14**
**SAN FRANCISCO—Flight 379**
One-way flights with return flight seats available . . . in one hour after call. — $70.00 per person

**Aug. 14**
**MYSTERY DINNER FLIGHT—Flt. 478**
One of VOYAGER 1000's most popular flights . . . we can't tell you where it's going but you'll have a great time. Air-plus-Air includes flight, ground transfers and 3 gourmet meals at top dining restaurants. — $31.50 per person

**Aug. 15**
**MYSTERY DINNER FLIGHT—Flt. 479**
FOR SINGLES ONLY. This night has been arranged for the singles group where VOYAGER 1000 has arranged for the singles group where VOYAGER. The package includes flight, transfers and dinner. — $31.50 per person
*Plus Federal excise (International Travel Tax.

**Aug. 20**
**Horse Around at Ever Downs, Flt. 5470**
Voyagers that swim, our members and associates love all the sports. Air-plus-Air includes flight, ground transfers, luncheon, entertainment, box seats. — $24.00 per person

**Aug. 25-30**
**MIAMI, FLA.—Flt. 453**
Air transportation only. Ground trip transportation only. — $74.00 per person

**VOYAGER Members Only**
call 241-9212
For Flight and For Membership Information

VOYAGER 1000

Aug 2

Section 9
Page 6

FLY TO

SPAIN-MOROCCO

WITH VOYAGER 1000

VOYAGER AIRSHARE $318.00 PER PERSON

Voyager Flt. 383 Departs Indianapolis Sept. 11. Returns Sept. 27.

*Optional Ground Package Available*

**Other Voyager Flights Coming Up:**

re only—Aug. 27-30

PLAYBOY CLUB SPECIAL ..... $99

Our first trip to the luxurious Playboy Club resort at Lake Geneva, Wis., was so successful that were returning for another six-day weekend. Package includes Airshare, hotel, taxes

re only—Sept. 17-20

COZUMEL, Mexico ..... $113

Relax, swim, sun, eat and thoroughly enjoy yourself on the Mexican island resort. Voyager's ground package includes accommodations at the luxury Continental Hotel, all meals and ground transfers. Optional ground package only $70.00.

re only—Sept. 17-20

MYSTERY FLIGHT ..... $203

We can't tell you where this flight is going . . . or even what direction it is heading because that would lessen the mystery surrounding it. We can tell you that the Airshare includes flight, luxury accommodations, International Travel Tax and a carefree atmosphere.

**VOYAGER MEMBERS ONLY . . .**

*Did you know that Voyager 1000 dues are only $6 per month . . . and that you can join this exclusive cooperative travel club for only $26 down?*

*If you like to travel . . . think VOYAGER*

**Call 241-9212**

For Membership and Reservation Information

Voyager 1000, Weir Cook Airport, Indianapolis 46241
Gentlemen: I understand there is now a limited number of memberships available. Kindly send information.

NAME ..... PHONE .....

ADDRESS ..... CITY ..... ZIP .....

VOYAGER 1000

Cincinnati
July 10, 1970

# Voyager 1000 spreads its wings



## the world's most successful travel club is now in Cincinnati

**and you're invited to our open house (free refreshments and entertainment) Sunday, July 12th at Lunken Airport. 12 noon to 8:00 P.M.** In front of the Cincinnati Aircraft Corp. Main Hangar

Bring the whole family. View one of our fleet of DC-7's. Hear the Voyager 1000 story from the friendly people who've made it the most successful non-profit travel club in the world . . . and the only one to own a jet airliner (a Boeing 707/720 that will go into service late this summer).

Voyager 1000 is a membership non-profit corporation, headquartered in Indianapolis, that owns and operates a fleet of jet planes exclusively for use by its members. It offers the fun, the education and the adventure of flying to spots all over the globe. Members go first class at the most economical prices available anywhere.

In Indianapolis Voyager 1000 has built its membership in the last five years to over 8,000 people. We take our fun seriously. We maintain a staff of 43 full-time employees. Our reservations are processed by IBM computer. Last year Voyager club members flew 80 million seat miles . . . to Acapulco, Bimini, Hawaii, Spain (to name a few).

Now we're eager to share the fun. Our new Cincinnati Voyager 1000 club welcomes experienced travel club members with a special price advantage . . . dues cut 50%.

As a sampling of the kind of trips you'll be offered, here are just a few of the nearly 20 flights Voyager has scheduled for its members in July and August.

| Date | Destination | Your Share |
|---|---|---|
| 7/14-19 | Mexico City<br>Ground Package | 135.00<br>64.00 |
| 7/27-8/2 | Freeport Zip Trip<br>Excise Tax<br>(Includes Air & Ground) | 134.00<br>6.40 |
| 8/6-23 | Frankfort—Oberammergau<br>Ground Package<br>(Includes Tickets) | 298.00<br>494.00 |
| 8/20-9/5 | EXPO '70 (Tokyo)<br>Excise Tax<br>(Total of all Air & Ground) | 793.00<br>6.00 |

(Indianapolis Departure)

In September our new jet goes into service. During that one month it will carry Voyager members to such places as Las Vegas, Acapulco, Jamaica, San Juan, and Nassau.

Flights will soon be scheduled for Cincinnati departure. There'll be long trips and short trips. Trips designed for you as a Voyager member. Application forms will be available at our open house.

Cincinnati Aircraft Corp. Terminal
Lunken Airport
Cincinnati, Ohio

VOYAGER 1000

Voyager 1000 Terminal, Weir Cook Municipal Airport, Indianapolis, Ind. 46241
(Or toll free to Indianapolis)
(800) 428-1771)

Cincinnati Post
p 15A

Sun 6/22/



VOYAGER 1000

TRAVEL WITH US . . .

VANCOUVER, CANADA $133.00

FREEPORT, BAHAMAS $102.00

MYRTLE BEACH, SOUTH CAROLINA $159.00

Sorry, only Voyager 1000 members can take our trips.
For information call 231-2150

Voyager 1000, 4242 Airport Road
Cincinnati, Ohio 45226

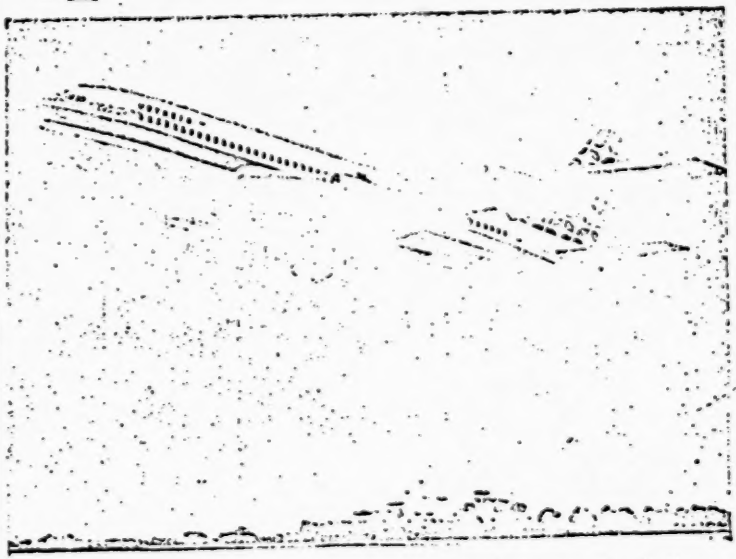
Gentlemen: I understand there is now a limited number of memberships available. Kindly send information.

NAME ..... PHONE

ADDRESS ... CITY ZIP

Friday, August 11, 1978, The Tribune, New Albany, Page 9


# Voyager 1000 spreads its wings



the world's most successful travel club
is now in Louisville

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# and you're invited to our open house Sunday August 16 at Standiford Field (free refreshments and entertainment), 12 noon to 8 P.M.

Standiford Field Air Cargo Terminal, (enter from Harding Avenue)

**INITIATION FEES WAIVED...YOU CAN JOIN FOR ONLY $36.00**
**(6 months dues down... Total years membership dues just $72.00)**

Bring the whole family. View one of our fleet of DC-7's. Hear the Voyager 1000 story from the friendly people who've made it the most successful co-operative travel club in the world . . . and the only one to own a jet.

Voyager 1000 is a member-owned non-profit corporation, headquartered in Indianapolis, that owns and operates a fleet of six planes exclusively for use by its members. It offers the fun, the education and the adventure of living to spots all over the globe. Members go first class at the most economical prices available anywhere.

In Indianapolis Voyager 1000 has built its membership in the last five years to over 20,000 people. We take our fun seriously. We maintain a staff of 45 full-time employees. Our reservations are processed by IBM computer. Last year Voyager club members flew 60 million seat miles . . . to Acapulco, Nassau, Hawaii, Spain (to name a few).

Voyager has been so successful that we've acquired a medium range Boeing 720 Jetliner designed to operate on routes up to 2,500 nautical miles, with 155 passengers. Its purpose is to provide our members more trips at less cost. Our professional flight and maintenance crews are highly trained and fully FAA-qualified. Skilled trip planning, sound business management, and a friendly club atmosphere have made Voyager 1000 the fastest growing travel club in the world. And the only one with a jet.

Now we're eager to share the fun. Our new Louisville Voyager 1000 club welcomes experienced travel club members with a special price advantage . . . dues cut 50%. Even if you've never belonged to a travel club before . . . you can now fly to the most beautiful spots on earth . . . at prices you never dreamed possible.

As a sampling of the kind of trips you'll be offered, here are just a few of the nearly 20 flights Voyager has scheduled for its members in July and August.

| Date | Destination | Your Share |
|---|---|---|
| 9/26-28<br>Jet Flight 3450 | San Juan, Puerto Rico<br>Ground Package | $148.00<br>49.00 |
| 10/1-4<br>Flight 458 | Panama<br>Ground Package | 150.00<br>73.00 |
| 10/14-18<br>Flight 464 | Caribbean Carnival<br>(Air share includes flight, hotels, transfers, some of gala events) | 202.00<br>(total) |
| 11/24-29<br>Flight 475 | Margarita Island (South America)<br>(includes flight, hotels, 2 meals daily) | 213.00 |
| 11/24-12/2<br>Jet Flight 3455 | HONOLULU<br>Ground Package | 329.40<br>145.00 |

(Indianapolis Departure)

In September our new jet goes into service. During that one month it will carry Voyager members to such places as Las Vegas, Acapulco, Jamaica, San Juan, and Nassau.

Flights will soon be scheduled for Louisville departure. There'll be long trips and short trips. Trips designed for you as a Voyager member. Application forms will be available at our open house.



# Jet Schedule

Flt. 3466–June 6-22 Departure 7:00 P.M.
COPENHAGEN-ZURICH ..... $249
Plus International Tax $3.00
Ground Packages (Itinerary Upon Request) from $150.00 to $423.00
Required: Passport, Smallpox Vac.

Flt. 3489–June 13-29 Departure 7:00 P.M.
MADRID-ZURICH ..... $249
Plus International Tax $3.00
Ground Packages (Itinerary Upon Request) from $150.00 to $370.00
Required: Passport, Smallpox Vac.

Flt. 3484–June 20-July 6 Departure 7:00 P.M.
COPENHAGEN-ZURICH ..... $249
Plus International Tax $3.00
Ground Packages (Itinerary Upon Request) from $150.00 to $423.00
Required: Passport, Smallpox Vac.

Flt. 3481–June 27-July 13 Departure 7:00 P.M.
COPENHAGEN-ZURICH ..... $249
Plus International Tax $3.00
Ground Packages (Itinerary Upon Request) from $150.00 to $423.00
Required: Passport, Smallpox Vac.

Flt. 3482–July 4-20 Departure 7:00 P.M.
BRUSSELS-ZURICH ..... $249
Plus International Tax $3.00
Ground Packages (Itinerary Upon Request) from $150.00 to $370.00
Required: Passport, Smallpox Vac.

Flt. 3483–July 11-27 Departure 7:00 P.M.
PARIS-ZURICH ..... $249
Plus International Tax $3.00
Ground Packages (Itinerary Upon Request) from $150.00 to $370.00
Required: Passport, Smallpox Vac.

Flt. 3466–July 18-August 3 Departure 7:00 P.M.
ZURICH, SWITZERLAND ..... $249
Plus International Tax $3.00
Ground Packages (Itinerary Upon Request) from $150.00 to $370.00
Required: Passport, Smallpox Vac.

Flt. 3485–July 25-August 10 Departure 7:00 P.M.
AMSTERDAM-ZURICH ..... $249
Plus International Tax $3.00
Ground Packages (Itinerary Upon Request) from $150.00 to $370.00
Required: Passport, Smallpox Vac.

Flt. 3480–August 1-17 Departure 7:00 P.M.
MADRID-ZURICH ..... $249
Plus International Tax $3.00
Ground Packages (Itinerary Upon Request) from $150.00 to $370.00
Required: Passport, Smallpox Vac.

Flt. 3487–August 8-24 Departure 7:00 P.M.
PARIS-ZURICH ..... $249
Plus International Tax $3.00
Ground Packages (Itinerary Upon Request) from $150.00 to $370.00
Required: Passport, Smallpox Vac.

Flt. 3490–August 15-31 Departure 7:00 P.M.
PARIS-ZURICH ..... $249
Plus International Tax $3.00
Ground Packages (Itinerary Upon Request) from $150.00 to $370.00
Required: Passport, Smallpox Vac.

Flt. 3491–Aug. 22-Sept. 7 Departure 7:00 P.M.
SHANNON-ZURICH ..... $249
Plus International Tax $3.00
Ground Packages (Itinerary Upon Request) from $150.00 to $423.00
Required: Passport, Smallpox Vac.

Flt. 3492–Aug. 29-Sept. 14 Departure 7:00 P.M.
MADRID-ZURICH ..... $249
Plus International Tax $3.00
Ground Packages (Itinerary Upon Request) from $150.00 to $370.00
Required: Passport, Smallpox Vac.

**Final Refund Date**—Date that Voyager check will be issued if cancellation received 90 days prior to scheduled departure.

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**VOYAGER 1050 HEADQUARTERS**
Weir Cook Airport
Indianapolis, Ind.
1 (317) 247-6221

**VOYAGER CINCINNATI**
4242 Airport Road – 45226
1 (513) 321-2960

**VOYAGER LOUISVILLE**
East Terminal
Standiford Field
1 (502) 368-9625

## June

682--June 2-6 Departs 7:00 a.m.
ON O BAY, JAMAICA ..... $108
Plus International Tax $3.00
tel Package (Casa Montego, 3 Meals Daily) $79.00
uired: Proof of Citizenship

663--June 3-6 Departs 7:00 a.m.
. LAUDERDALE, FLORIDA ..... $79
Hotel Package

654--June 4-6 Departs 3:00 p.m.
W ORLEANS ZIP TRIP ..... $69
cludes Air and Hotel Package) Maxwelcon

683--June 5-6 Departs 4:00 p.m.
UWAUKEE, WISCONSIN ZIP TRIP ..... $45
cludes Airfare, Hotel, Race Ticket and Transfers) Holiday Inn

665--June 7-10 Departs 7:00 a.m.
CAPULCO, MEXICO ..... $132
Plus International Tax $3.00
tel Package (Paraiso Marriott) $85.00
uired: Tourist Card, Proof of Citizenship

626--June 10-13 Departs 8:00 a.m.
ONTREAL, CANADA ..... $60
Plus International Tax $3.00
tel Package (Sheraton) $39.00
uired: Proof of Citizenship

566--June 11-13 Departs 8:00 a.m.
EEPORT, BAHAMAS ZIP TRIP ..... $99
Plus International Tax $3.00
cludes Air and Hotel Package) Ocean
uir Proof of Citizenship

56b June 11-13 Departs 8:00 a.m.
ONTEGO BAY, JAMAICA ..... $103
Plus International Tax $3.00
tel Package (CasaMontego, 3 Meals Daily) $49.00
uired: Proof of Citizenship

585--June 11-13 Departs 2:00 p.m.
INGLES--NEW YORK CITY, N. Y. ZIP TRIP ... $80
cludes Air and Hotel Package) Royal Manhattan

509--May 17-20 Departs 6:00 a.m.
KE LOUISE, CANADA ..... $125
Plus International Tax $3.00
el Package (Chateau Lake Louise, 3 Meals Daily) $128.00
uired: Proof of Citizenship

467--June 17-20 Departs 7:00 a.m.
NO, NEVADA ..... $142
tel Package (Holiday Hotel or Similar) $57.50

610--June 18-20 Departs 3:00 p.m.
W ORLEANS ZIP TRIP ..... $69
lude Air and Hotel Package) Maxwelcon

669--June 18-20 Departs 7:00 a.m.
SSAU ZIP TRIP ..... $69
Plus International Tax $3.00
cludes Air and Hotel Package) Flagler Inn
uired: Proof of Citizenship

627--June 24-27 Departs 7:00 a.m.
PETERSBURG, FLORIDA ..... $79
Hotel Package

670 June 24-27 Departs 12:15 a.m.
TE. ATIONAL MYSTERY ???? ..... $169
Plus International Tax $3.00
cludes Air and Hotel Package)
uired: Proof of Citizenship

686--June 24-27 Departs 5:00 a.m.
ANCOUVER, CANADA ..... $130
Plus International Tax $3.00
tel Package (Empress, 3 Meals Daily) $79.00
uired: Proof of Citizenship

## June (Cont'd)

Flt. 634--June 25-27 Departs 7:00
FREEPORT, BAHAMAS ZIP TRIP ..... $99
Plus International Tax $3.00
(Includes Air and Hotel Package) Oceanus
Required: Proof of Citizenship

Flt. 548--June 26-July 3 Departs 8:00 a.m.
MIAMI, FLORIDA (SHRINE CONVENTION) ..... $75
No Hotel Package

Flt. 549--June 29-July 4 Departs 8:00 a.m.
MYRTLE BEACH, SOUTH CAROLINA ZIP TRIP... $159
(Includes Air and Hotel Package) (Ocean Forest, 3 Meals Daily)

## July

Flt. 687--July 3-4 Departs 7:00 a.m.
POCONO 500 RACE ZIP TRIP ..... $64
(Includes Hotel and Tickets) Hilton

Flt. 778--July 2-5 Departs 8:00 a.m.
FREEPORT ..... $110
Plus International Tax $3.00
(Includes Air and Hotel Package) Oceanus
Required: Proof of Citizenship

Flt. 803--July 8-11 Depart 6:00 a.m.
KENORA, CANADA ZIP TRIP ..... $159
Plus International Tax $3.00
(Includes Air and Hotel Package) Devils Gap Lodge
(Includes Meals, Boat, Guide)
Required: Proof of Citizenship

Flt. 671--July 8-11 Departs 8:00 a.m.
QUEBEC, CANADA ..... $70
Plus International Tax $3.00
Hotel Package (LeChateau Frontenac, 3 Meals Daily) $74.00
Required: Proof of Citizenship

Flt. 688--July 9-11 Departs 2:00 p.m.
--SINGLES--NEW ORLEANS ZIP TRIP ..... $69
(Includes Air and Hotel Package) Maxwelcon

Flt. 804--July 16-18 Departs 7:00 a.m.
FREEPORT, BAHAMAS ZIP TRIP ..... $99
Plus International Tax $3.00
(Includes Air and Hotel Package) Oceanus
Required: Proof of Citizenship

Flt. 672--July 16-18 Departs 8:00 a.m
WILLIAMSBURG, VIRGINIA ZIP TRIP ..... $69
(Includes Air and Hotel Package) Williamsburg Motor Inn

Flt. 689--July 21-25 Departs 2:00 a.m.
ST. MAARTEN (NETHERLAND ANTILLES)..... $150
Plus International Tax $3.00
Hotel Package (Little Bay Beach, 3 Meals Daily) $89.00
Required: Proof of Citizenship, Smallpox Vac.

Flt. 779--July 30-Aug. 1 Departs 7:00 a.m.
FREEPORT, BAHAMAS ZIP TRIP ..... $99
Plus International Tax $3.00
(Includes Air and Hotel Package) Oceanus
Required: Proof of Citizenship

## August

Flt. 780--August 5-8 Departs 7:00 a.m.
SAN JUAN, PUERTO RICO ..... $130
Plus International Tax $3.00
Hotel Package (American) $54.00
Required: Proof of Citizenship

## August (Continued)

. 701—August 6-8 Departs 3:00 p.m.
NEW ORLEANS ZIP TRIP ..... $69
(Includes Air and Hotel Package) Monteleone

. 690—August 8-11 Departs 7:00 a.m.
TORONTO, CANADA ..... $30
Plus International Tax $3.00
Hotel Package (Four Seasons) $59.00
Required: Proof of Citizenship

. 782—August 12-15 Departs 6:00 a.m.
MONTEGO BAY, JAMAICA ..... $108
Plus International Tax $3.00
Hotel Package (Casa Montego) $74.00
Required: Proof of Citizenship

. 783—August 13-15 Departs 7:00 a.m.
FREEPORT, BAHAMAS ZIP TRIP ..... $99
Plus International Tax $3.00
(Includes Air and Hotel Package) Oceanus
Required: Proof of Citizenship

. 784—August 18-22 Departs 7:00 a.m.
ST. CROIX, VIRGIN ISLANDS ..... $135
Plus International Tax $3.00
Hotel Package (St. Croix by the Sea, 3 Meals Daily) $115.00
Required: Proof of Citizenship

. 691—August 19-22 Departs 6:00 a.m.
KENORA, CANADA ZIP TRIP ..... $159
Plus International Tax $3.00
(Includes Air and Hotel Package) Devils Gap Lodge, includes meals boat and guide
Required: Proof of Citizenship

. 785—August 20-22 Departs 7:00 a.m.
FREEPORT, BAHAMAS ZIP TRIP ..... $99
Plus International Tax $3.00
(Includes Air and Hotel Package) Oceanus
Requires: Proof of Citizenship

. 786—August 25-29 Departs 7:00 a.m.
LOS ANGELES-DISNEYLAND ..... $149
Los Angeles Package (Hotel: Statler-Hilton) $79.00
Disneyland Package (Hotel: Disneyland Hotel) $99.00

. 787—August 26-29 Departs 2:00 a.m.
ARUBA (NETHERLAND ANTILLES) ..... $160
Plus International Tax $3.00
Hotel Package (Holiday Inn) $60.00
Requires: Proof of Citizenship

. 788—August 27-29 Departs 3:00 p.m.
NEW ORLEANS ZIP TRIP ..... $69
(Includes Air and Hotel Package) Monteleone

## September

. 692—September 2-6 Departs 12:15 a.m.
INTERNATIONAL MYSTERY ? ? ? ..... $200
Plus International Tax $3.00
(Includes Air and Hotel Package)
Required: Proof of Citizenship

. 550—September 3-6 Departs 6:00 a.m.
LAKE LOUISE, CANADA ..... $125
Plus International Tax $3.00
Hotel Package (Chateau Lake Louise, 3 Meals Daily) $122.00
Required: Proof of Citizenship

. 551—September 3-6 Departs 8.00 a.m.
LAS VEGAS/ONTARIO 500 RACE ZIP TRIP ..... $220
(Inc Air and Hotel Package and Tickets) Tropicana

. 693—September 3-6 Departs 7:00 a.m.
FREEPORT, BAHAMAS ZIP TRIP ..... $110
Plus International Tax $3.00
(Includes Air and Hotel Package) Oceanus
Required: Proof of Citizenship

. 694—September 9-12 Departs 7:00 a.m.
ACAPULCO, MEXICO ..... $132
Plus International Tax $3.00
$33.00

## September (Continued)

Flt. 696—September 10-12 Departs 9:00 a.m.
TREASURE CAY, BAHAMAS ZIP TRIP ..... $
Plus International Tax $
(Includes Air and Hotel Package) Treasure Cay Yacht Club
Required: Proof of Citizenship

Flt. 697—September 10-12 Departs 7:00 a.m.
NASSAU, BAHAMAS ZIP TRIP ..... $
Plus International Tax $
(Includes Air and Hotel Package) Flagler
Required: Proof of Citizenship

Flt. 789—September 16-19 Departs 6:00 a.m.
BERMUDA ..... $
Plus International Tax $
Single Supplement $
Hotel Package (Castle Harbour, Includes Two Meals Daily) $
Required: Proof of Citizenship

Flt. 699—September 17-19 Departs 7:00 a.m.
LAS VEGAS, NEVADA ZIP TRIP ..... $
(Includes Air and Hotel Package) Hacienda

Flt. 700—September 17-19 Departs 8.00 a.m.
FREEPORT, BAHAMAS ZIP TRIP ..... $
Plus International Tax $
(Includes Air and Hotel Package) Oceanus
Required: Proof of Citizenship

Flt. 701—September 23-26 Departs 7:00 a.m.
COZUMEL, MEXICO ..... $
Plus International Tax $
Hotel Package (Cantarell, 3 Meals Daily) $
Required: Tourist Card, Proof of Citizenship

Flt. 790—September 23-26 Departs 7:00 a.m.
VERA CRUZ, MEXICO ..... $
Plus International Tax $
Hotel Package (Villa Rambe, 3 Meals Daily) $
Required: Proof of Citizenship, Tourist Card

Flt. 703—September 24-26 Departs 7:00 a.m.
FREEPORT, BAHAMAS ZIP TRIP ..... $
Plus International Tax $
(Includes Air and Hotel Package) Oceanus
Required: Proof of Citizenship

Flt. 704—September 24-26 Departs 9:00 a.m.
TREASURE CAY ZIP TRIP ..... $
Plus International Tax $
(Includes Air and Hotel Package) Treasure Cay Yacht Club
Required: Proof of Citizenship

Flt. 705—September 30-October 3 Departs 7:00 a.m.
ACAPULCO, MEXICO ..... $
Plus International Tax $
Hotel Package (Pardise Marriott) $
Required: Tourist Card, Proof of Citizenship

Flt. 706—September 30-October 3 Departs 8.00 a.m.
PUERTO VALLARTA, MEXICO ..... $
Plus International Tax $
Hotel Package (Posada Vallarta, 3 Meals Daily) $
Required: Tourist Card, Proof of Citizenship

Flt. 707—September 30-October 3 Departs 9:00 a.m.
HAITI ..... $
Plus International Tax $
Hotel Package (Castelhaiti) $
Required: Proof of Citizenship, Smallpox Vac.

## October

Flt. 708—October 1-5 Departs 9.00 a.m.
TREASURE CAY ZIP TRIP ..... $
Plus International Tax $
(Includes Air and Hotel Package) Treasure Cay Yacht Club
Required: Proof of Citizenship

Flt. 791—October 7-10 Departs 8.00 a.m.
MONTEGO BAY, JAMAICA ..... $
Plus International Tax $
Hotel Package (Casa Montego, 3 Meals Daily) $

## October (Continued)

9. 792—October 7-10 Departs 7:00 a.m.
MAZATLAN, MEXICO ..... $130
Plus International Tax $3.00
Hotel Package (Hotel Playa, 2 Meals Daily) $39.00
Required: Proof of Citizenship, Tourist Card

9. 793—October 8-10 Departs 2:00 p.m.
NEW ORLEANS ZIP TRIP ..... $69
(Includes Air and Hotel Package) Monteleone

9. 711—October 8-10 Departs 7:00 a.m.
LAS VEGAS, NEVADA ZIP TRIP ..... $165
(Includes Air and Hotel Package) Hacienda

9. 794—October 14-17 Departs 8:00 a.m.
ST. CROIX, VIRGIN ISLANDS ..... $135
Plus International Tax $3.00
Hotel Package (St. Croix By The Sea, 2 Meals Daily) $109.00
Required: Proof of Citizenship

9. 714—October 15-17 Departs 7:00 a.m.
FREEPORT, BAHAMAS ZIP TRIP ..... $99
Plus International Tax $3.00
(Includes Air and Hotel Package) Oceanus
Required: Proof of Citizenship

9. 795—October 21-24 Departs 7:00 a.m.
ST. THOMAS, VIRGIN ISLANDS ..... $135
Plus International Tax $3.00
Hotel Package (Pineapple Beach, Includes 2 Meals Daily) $89.00
Required: Proof of Citizenship

9. 796—October 21-24 Departs 2:00 p.m.
SAN ANDRES ..... $149
Plus International Tax $3.00
Hotel Package (El Isleo, Includes 2 Meals Daily) $52.00
Req. Proof of Citizenship, Tourist Card, Smallpox Vac.

9. 797—October 21-24 Departs 6:00 a.m.
ST. LUCIA ..... $149
Plus International Tax $3.00
Hotel Package (Holiday Inn) $45.00
Required: Proof of Citizenship

9. 798—October 22-24 Departs 7:00 a.m.
LAS VEGAS, NEVADA ZIP TRIP ..... $165
(Includes Air and Hotel Package) Hacienda

9. 799—October 28-31 Departs 7:00 a.m.
CARACAS ..... $165
Plus International Tax $3.00
Hotel Package (Maruma Sheraton) $60.00
Required: Proof of Citizenship, Tourist Card

9. 800—October 28-31 Departs 7:00 a.m.
ARUBA (LESSER ANTILLES) ..... $160
Plus International Tax $3.00
Hotel Package (Sheraton) $60.00
Required: Proof of Citizenship

9. 801—October 28-31 Departs 8:00 a.m.
CURACAO (NETHERLAND ANTILLES) ..... $149
Plus International Tax $3.00
Hotel Package (Intercontinental) $44.00
Required: Proof of Citizenship

9. 802—October 29-31 Departs 7:00 a.m.
FREEPORT, BAHAMAS ZIP TRIP ..... $99
Plus International Tax $3.00
(Includes Air and Hotel Package) Oceanus
Required: Proof of Citizenship

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$ Share cost includes 5% excise tax where applicable.

Land Package Includes—First Class hotel accommodations, service charges, hotel taxes, transfers, assistance through immigration luggage handling.

9 Trip—Includes Airshare and Ground Package.

Final Refund Date—Date that Voyager check will be issued if cancellation received 30 days prior to scheduled departure.

## Voyager Flights to Freeport

Package prices listed below include air and ground, including hotel accommodations at the Princess Konikoni, ground transfers, luggage handling, all service charges and taxes.

| | per person |
|---|---|
| If reservations are made before June 1 | $299 |
| If reservations are made before August 1 | $319 |
| If reservations are made after August 1 | $339 |

**FLIGHT SCHEDULE**

| | |
|---|---|
| Flt. 3469 | Oct. 2- 8 |
| Flt. 3470 | Oct. 9-15 |
| Flt. 3471 | Oct. 16-22 |
| Flt. 3472 | Oct. 23-29 |
| Flt. 3473 | Oct. 30-Nov. 5 |
| Flt. 3474 | Nov. 6-12 |

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## Voyager Family Flights to Acapulco

Package prices listed below include air and ground, including hotel accommodations, ground transfers, luggage handling, all service charges and taxes, plus assistance through customs upon return.
*Supplemental charge of $105 for families of more than 5 persons.*

| | per person |
|---|---|
| First Person | $260.00 |
| Second Person | $160.00 |
| Each Child | $120.00 |
| International Tax per person | $ 3.00 |

**FLIGHT SCHEDULE**

| | |
|---|---|
| Flt. 9001 | July 3 - July 10 |
| Flt. 9002 | July 10 - July 17 |
| Flt. 9003 | July 17 - July 24 |
| Flt. 9004 | July 24 - July 31 |
| Flt. 9005 | July 31 - Aug. 6 |

The Final Refund Date is May 31
All flights depart Voyager Terminal 7:00 A.M.
Tourist Card & Proof of Citizenship Required
Hotel—Paraiso Marriott

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## Voyager Family Flights to Freeport

Package prices listed below include air and ground, including accommodations at Shalimar Hotel, ground transfers, luggage handling, all service charges and taxes, plus assistance through customs upon return. **ALL HOTEL ROOMS CONTAIN KITCHENETTE.**
*Supplemental charge of $72 for families of more than 5 persons.*

| | BEFORE MAY 1 | AFTER MAY 1 |
|---|---|---|
| | per person | per person |
| First Person | $129.00 | $139.00 |
| Second Person | $109.00 | $119.00 |
| Children (12-18) | $ 79.00 | $ 89.00 |
| Children (Under 12) | $ 59.00 | $ 69.00 |
| International Tax | $ 3.00 | $ 3.00 |

**FLIGHT SCHEDULE**

| | |
|---|---|
| Flt. 629 | July 3 - July 10 |
| Flt. 630 | July 10 - July 17 |
| Flt. 631 | July 17 - July 24 |
| Flt. 632 | July 24 - July 31 |
| Flt. 633 | July 31 - Aug. 6 |
| Flt. 774 | Aug. 7-13 |
| Flt. 775 | Aug. 14-21 |

All flights depart Voyager Terminal 8:00 A.M.

**EXHIBIT B**

Order 73-3-1

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 1st day of March, 1973

| | |
|---|---|
| VOYAGER 1000<br>ADAM RUECKERT, Individually<br>ROBERT J. FINK, Individually<br>A. LEE CLIFFORD, Individually<br>*Respondents*<br>Enforcement Proceeding | Docket 23991 |

ORDER

A full public hearing having been held in the above-entitled proceeding, and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision,

IT IS ORDERED:

1. That Voyager 1000, its officers, directors, agents, representatives, successors, and assigns cease and desist from engaging in air transportation in violation of Section 401 (a) of the Federal Aviation Act by holding out to the public at large transportation by aircraft for compensation or hire through membership in Voyager 1000 or any other similar organization operating in a comparable manner.

2. That this proceeding, insofar as it relates to Adam Rueckert, Robert J. Fink, and A. Lee Clifford, each individually, be and it hereby is dismissed.

3. That this order shall be effective sixty (60) days after issuance thereof, provided, however, that Voyager 1000 shall during said 60 days discontinue all advertising and public promotion of Voyager 1000 membership and services, and shall not during said 60 days accept any new member.

BY THE CIVIL AERONAUTICS BOARD:

HARRY J. ZINK
*Secretary*

(SEAL)

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

| | |
|---|---|
| VOYAGER 1000<br>ADAM RUECKERT, Individually<br>ROBERT J. FINK, Individually<br>A. LEE CLIFFORD, Individually<br>*Respondents*<br>Enforcement Proceeding | Docket 23991 |

Decided: March 1, 1973

Voyager 1000 found to be a common carrier engaged in air transportation without board authorization and ordered to cease and desist from violating the Act. Complaint dismissed as to the three named individual respondents.

APPEARANCES:

*Harry A. Bowen* for respondents.

*Peter C. Edison* and *T. Christopher Browne* for the Bureau of Enforcement, Civil Aeronautics Board.

OPINION

By The Board:

This proceeding involves a complaint by the Bureau of Enforcement against Voyager 1000 and three of its officer-directors, charging Voyager with engaging in air transportation without operating authority from the Board in violation of Section 401 of the Federal Aviation Act. The relief sought is an order directing the respondents to cease and desist from such alleged violations.

Following hearings, Administrative Law Judge Madden issued an intial decision on June 22, 1972. He concluded that Voyager's operations did not amount to common carriage and hence that it was not engaged in air transportation. Accordingly, the examiner ordered the complaint dismissed.

The case is now before the Board for decision on BOE's petition for discretionary review which was granted by Order 72-8-34 (August 7, 1972). Briefs have been received and oral argument heard. Finding that Voyager's operations do involve common carriage by aircraft, the Board reverses the initial decision.[1]

## I

The details of Voyager's background and method of operation are set forth in the appendix. It will thus suffice for present purposes to confine ourselves to an outline.

Voyager was founded in 1964 as a non-profit Indiana corporation. The founders contemplated a private club, limited to 1000 members, which would acquire an aircraft for recreational travel by members.[2] Intitiation fees of $200 for a family membership and $125 for an individual membership were established, and monthly dues were $4.00.

The goal of 1000 members was achieved within a year and a second club, Voyager 2000, was formed in 1965.[3] Voyager 2000 was merged into Voyager 1000 and the merged club's membership stood at a fairly constant 2,400 through early 1968.

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[1] Attached as an appendix are excerpts from the initial decision with which we agree and which we adopt as our own.

[2] There were 25 "founding members," 10 of whom contributed $1,000 each for the down payment on the aircraft.

[3] The record does not indicate how many members were originally recruited.

In the spring of 1968, Voyager fell upon hard financial times. While various steps were taken to meet the immediate crisis on a short-term basis, the directors decided that the long-term solution to Voyager's fiscal ills lay in a greatly expanded membership and an extensive public campaign to achieve that objective, a campaign which, so far as the record shows, continues unabated.

Voyager's promotion efforts took various forms, spearheaded by mass media communication. Advertisements were regularly placed in eight newspapers in Indiana, Ohio, and Kentucky with a combined circulation of more than one million copies. These advertisements featured Voyager flight schedules, showing flight number, destination, and fare. While in terms addressed to "Voyager Members Only," they openly solicited "non-members" to become "members" in order to take the flights.[4]

"Open houses" to visit Voyager's facilities, inspect one of its aircraft, and "hear the Voyager 1000 story" were held and widely advertised. These advertisements typically contained a list of upcoming flights and advised the reader that "we're eager to share the fun"; that he could join with "dues cut 50%"; and that membership "application forms will be available at our open house."[5]

Another avenue pursued by Voyager was direct mailing of brochures describing flight programs—dates, flight numbers, departure times, and fares. These would be sent to

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[4] A typical advertisement listed various flights available to "Voyager Members Only," adding "that you can join this exclusive cooperative travel club for only $36 down" and providing a telephone number to be called "for membership and reservation information." Also provided was a coupon which could be mailed to Voyager for the same information.

[5] Other mass media solicitation included a full-page advertisement in Holiday Magazine in the spring of 1971 and regular commercials (three to six per week) on a Cincinnati radio station during the last three months of 1970.

non-members as well as members.[6] To this end, Voyager purchased a commercial mailing house mailing list, "such as all passport holders in the midwest" (Tr. 96). The brouchures were also mailed to members of large organizations such as the Indiana State Teachers Association (Tr. 97).

As part of the mass recruitment programs, special inducements to become Voyager members were offered. The regular initiation fee (originally $200 for a family and $125 for an individual membership) was reduced to $10 and even this was "waived" during particular "membership drive[s]" (See, *e.g.*, BOE Exhibits 12 and 31, and Tr. 86-88). Monthly dues were set at a modest $6 ($7 as of the time of the hearings). "Membership" and consequent eligibility to participate in Voyager flights were offered for payment of $31, representing "$10 initiation fee" and "first three months dues (if within 100 miles of Indianapolis); six months dues (from 100 to 200 miles of Indianapolis); full year dues (more than 200 miles from Indianapolis)." (I.D., Appendix 1). College students became the focus of special recruitment attention. "Student memberships" were sold for a flat rate of $10, representing an "initiation fee" of $5 and "annual dues" of $5, by on-campus promoters employed by Voyager and compensated by free flights.

While membership application forms contained blanks for the name of new member's sponsor and "membership committee action" (*i.e.*, "approved" or "disapproved"), there was in reality no screening. No "applicant" was ever turned down. There was no screening committee and if an application was received with the blank for a sponsor's name uncompleted, a Voyager employee would sign

[6] Voyager printed 100,000 copies of its "Europe '72 Program," more than seven times the number of its members in the spring of 1972.

as sponsor (Tr. 26). Indeed, a former Voyager official testified that "many of our memberships just came in through the mail with a check attached to this coupon they had clipped out of the paper" (Tr. 25).

As a result of Voyager's mass solicitation of the public, "membership" increased dramatically. From 2400 in the spring of 1968 it rose to 14,500 by the spring of 1972 and 17,000 by October of 1972.[7]

In order to serve these members Voyager operates a fleet of aircraft which includes a Boeing 720 jet configured to seat 155 passengers, two Lockheed Electras configured to seat 117 each, two DC-7's and two Martin 404's. Voyager has its own terminal at Weir Cook International Airport in Indianapolis, Indiana, and employs over 80 employees in the operation and maintenance of its aircraft and in its offices and reservation services.

Voyager maintains an extensive flight schedule from Indianapolis. Between March, 1970, and May, 1971, Voyager operated 200 flights and from July, 1971, to April, 1972, it operated 156 flights. During the summer of 1971 it offered two-week package trips to Zurich (usually with a stop at one other European point) on a weekly basis, and during the summer of 1972 it programmed Indianapolis-Zurich flights on a weekly basis. Frequent, scheduled service to other European points was also offered, in addition to the Bahamas and Jamaica, as well as to popular domestic resorts.

## II

"Air transportation" is defined by section 101(21) of the Federal Aviation Act as "the carriage by aircraft of persons or property as a common carrier for compensation

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[7] Since, on the average, each membership represents three persons, the number eligible to participate in Voyager flights as of October of last year was thus approximately 51,000 persons.

or hire" in interstate, overseas and foreign commerce, and such operation are unlawful when conducted without operating authority from the Board (section 401(a)). Since Voyager holds no such authority and insists that it needs none, the question is whether it has operated as a "common carrier."

In the *Transocean A.L., Enforcement Proceeding*, 11 C.A.B. 352-353 (1950), the Board set forth quite simply its analysis of the term "common carrier" as follows:

> "The term 'common carrier' is not defined in the Act. Generally speaking, a common carrier is defined as one who holds himself out as ready and willing to undertake for hire the transportation of passengers or property from place to place, and so invites the patronage of the public.[2] On the other hand, a private carrier for hire is generally defined as one who, without being engaged in the business of carrying as a public employment, undertakes to deliver goods or persons in a particular case for hire or reward.[3]
>
> "The breadth of the activities contemplated under the term 'common carrier' reflects the great variety of recognized means whereby the 'holding out' may be accomplished. The most obvious method of a holding out which may result in common carriage is advertising through magazines, newspapers, posters, brochures, and the like. Should the evidence disclose that a carrier has advertised its services in such manner as to solicit business from the general public, the necessary implication arises that it has held itself out as being in readiness to carry for

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[2] *Stimson Lumber Co.* v. *Kuykendall*, 275 U.S. 207, 211 (1927); *Smitheran & McDonald* v. *Mansfield Hardwood Lumber Co.*, 6 F.2d 29, 31 (W.R. Ark., 1925); *United States* v. *Sioux City Stock Yards Co.*, 162 F. 556, 560 (N.D. Iowa, 1908), aff'd 167 F.2d 126 (C.A. 8th 1909).

[3] *Smitheran & McDonald* v. *Mansfield Hardwood Lumber Co.*, *supra*.

all who might apply.[4] Nevertheless, the lack of advertising is not in itself determinative of whether there has been a holding out since a holding out may take place through other methods.

"For example, a holding out may result from personal solicitation through salesmen, or through agents. The courts are in substantial agreement that the solicitation of passengers or freight shipments from the general public through solicitors or agents is convincing evidence of the holding out to carry for all who may apply.[5] In fact, the courts have held that a course of conduct without solicitation or advertisement may support a finding that there has been a holding out if the facts indicate that the carrier generally accepted within the limits of its facilities all customers desiring its services.[6] In short, the requisite holding out may be evinced by any means which communicates to the public that a transportation service is indiscriminately available. A reputation gained through merely serving the public indiscriminately may be sufficient in itself to inform the public that the carrier will carry for all who apply within the limits of its facilities.

"Furthermore, it is clear that a carrier need not undertake to serve all the public in order to be considered a common carrier, but may limit its transportation services to a class or segment of the general public so long as it expresses a willingness to provide transportation for all within this class or segments indiscriminately.[7] In determining whether

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"[4] State v. Witthaus, 340 Mo. 1004, 102 S.W. 2d 99 (1937).

"[5] *Grolbert* v. *Board of Railroad Comr's. of State of Iowa*, 60 F.2d 321, 323 (S.D. Iowa, 1932); *Breuer* v. *Public Utilities Commission*, 118 Ohio St. 95; 160 N.E. 623, 624 (1928).

"[6] *Stoner* v. *Underseth*, 85 Mont. 11; 277 P. 437, 441 (1929); *Marshall* v. *Public Service Commission*, 129 Pa. S. 272, 195 A. 475, 476 (1937).

"[7] *Terminal Taxicab Co.* v. *Dist. of Col.*, 241 U.S. 252, 255 (1916); *Anderson* v. *Fidelity & Casualty Co.*, 228 N.Y. 475, 127 N.E. 584, 587 (1920). This concept is embodied explicitly in the

> a carrier is in fact a common carrier, isolated instances of refusal to transport, or discrimination between, persons seeking the service will not in themselves prevent a carrier from being a common carrier[8] . . ."

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definition of common carrier contained in section 213 (14) of the Motor Carrier Act of 1935.

"[8] *Grolbert* v. *Board of Railroad Com'rs. of State of Iowa*, 60 F.2d 321 (S.D. Iowa, 1932)."

The principles applicable to this question of what constitutes a "common carrier" are further epitomized in *Las Vegas Hacienda, Inc.* v. *Civil Aeronautics Board*, 298 F.2d 430 (C.A. 9, 1962), *cert. denied*, 369 U.S. 885. The Court there stated that the fundamental test is whether the alleged carrier holds itself out as ready and willing to undertake the transportation of persons or property from point to point for compensation or hire. The statute, it held, must be interpreted as "bringing within the regulatory scheme all those who compete in the commercial market in the business of offering air transportation to the public generally" (298 F.2d at 434) that is those who engage in "the furnishing of transportation by air to the general public on a commercial basis" (298 F.2d at 436). The Court stressed, moreover, that in applying the statute, the Board is to be guided not by the labels the alleged carrier attaches to his activities, but on what he actually does.[8] Applying the *Transocean* test and the *Hacienda* test to the activities disclosed by this record, the Board finds that Voyager is operating as a common carrier.

We can readily dispose of several aspects of the issue confronting us. It is obvious that Voyager is providing carriage of persons by aircraft. Equally obviously, it is doing so for compensation or hire in interstate, overseas,

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[8] See, also Consolidated Flower Shipments, Inc. v. Civil Aeronautics Board, 213 F.2d 814 (C.A. 9, 1954).

and foreign commerce.[9] The question, then, is whether it has held out its services to the general public. Viewing its activities objectively and in their collective totality, we find that it has, despite the labels attached to those activities.

The record is clear that Voyager's extensive flight schedules have been widely advertised to the public at large. We are unpersuaded that the advertisements were simply a means of communicating with existing "members." While it is true that some, but by no means all, of the advertisements carried the legend "For Voyager Members Only" or words of similar import, the most reasonable inference, and the one we draw, is that the advertising was designed to reach and attract those who were not already members.[10]

It would, we find, be equally unrealistic to treat the advertising and other promotional efforts as mere "membership drives." It is quite true, of course, that one responding to Voyager's public solicitation must become a

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[9] This conclusion is in no way undercut by the fact that Voyager may be a nonprofit corporation. Consolidated Flower Shipments, 16 C.A.B. 804 (1953), aff'd, Consolidated Flower Shipments v. C.A.B., *supra*, 213 F.2d 814.

[10] This alone distinguishes the case from Eastern Air Lines v. Trans International Airlines, Order E-21440 (October 23, 1964) which involved a determination by the Bureau of Enforcement that mass media advertising addressed to specific organizations and groups was not solicitation of the general public under the affinity charter regulations in effect have prevented a person joining one of the groups to which the advertisements were directed from participating in a flight until six months after joining. Here, in contrast, one could become a Voyager "member" and fly immediately, and the record shows that many did take a Voyager flight shortly after becoming "members." In any event, the holding sustained in the Trans International case is obsolete as the result of changes in the regulations. They now include within the definition of public solicitation mass media advertising of flights "whether or not . . . addressed to members of a specific organization" (14 CFR 207.40, 208.210, 212.40, 214.30). As the Bureau of Enforcement says in its brief, this reflects "the futility of basing a distinction between proper and unlawful solicitation which reaches the general public on the inclusion or omission of the phrase 'for members only.'"

"member" before he can take a Voyager flight and that, to that end, he must pay an "initiation fee" and a part of his "annual dues." To accept these requirements and the labels attached to them as dispositive however, would exalt form over substance. "Membership" is offered to the public at large and is readily available to anyone willing to pay the "initiation fee" and a portion of the "dues."[11] This outlay, in turn, is relatively insignificant, particularly when viewed in light of the fare bargain it buys.[12] Added to these considerations are the facts that the very reason for Voyager's existence is the transportation and that the basic reason for obtaining "membership" is to take advantage of its transportation service. Thus, "members" are solicited from the public at large and join with ease for the purpose of obtaining transportation at reduced rates.[13] This, the Board has long held, amounts to a holding out of transportation to the general public even when the ostensible purpose of the organization is unrelated to travel.[14]

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[11] As indicated earlier, there is no screening of "applicants." A check attached to a coupon clipped from an advertisement satisfies the requirements for membership.

[12] As previously indicated, a "membership" can be obtained for as little as $31. On the basis of three persons per membership, which the examiner found to be the average, this comes to $10 each. Immediately upon joining, this member could purchase a 1972 peak-season Voyager trip to Zurich for $249. This contrasts with a peak-season 14-21-day excursion fare of $577 on the scheduled carriers, a saving of $328, or $984 for a family of three.

[13] During oral argument, counsel for Voyager answered in the affirmative when asked whether the primary purpose of Voyager was to provide air transportation to the public. Viewing this most favorably to Voyager, its primary purpose is to provide air transportation to any member of the public desiring to become a member.

[14] *See*, e.g., Capitol Airways, Exemption, 31 CAB 957 (1960). Moreover, one of the factors which the Board has considered as strongly indicating such a holding out by such an organization is solicitation of new members by advertisements in which reference is made to prospective charter flights for the organization. The Voyager advertisements did not merely refer to its flight schedule, they featured them.

The same conclusion follows *a fortiori* where, as here, the avowed purpose of the organization is travel. *Consolidated Flower Shipments*, 16 CAB 804 (1953), *aff'd*, *Consolidated Flower Shipments*, v. *C.A.B.*, 213 F.2d 814 (C.A. 9, 1954).[15]

In sum, viewing its activities objectively, we find that Voyager widely promoted and provided air transportation to the general public in return for the payment of money. Despite the various labels Voyager attaches to itself and to various aspects of its method of operation, it is "furnishing transportation by air to the general public on a commercial basis." (*Las Vegas Hacienda* v. *C.A.B.*, *supra*, 298 F.2d at 436), and hence it engaged in "air transportation" within the meaning of the Act.[16] Lacking operating authority from the Board, Voyager's operations are in violation of section 401(a) of the Act.[17]

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[15] The similarities between *Consolidated Flower* and this case are striking. It, too, involved a nonprofit corporation performing a transportation service—a cooperative of members who were flower shippers. It, too, involved widespread solicitation of membership. In finding the cooperative to be engaged in common carriage, the Board rejected a defense based on the fact that it was a nonprofit corporation whose services were available only to its members. The Board said (16 C.A.B. at 805):

> "The fact that membership in Bay Area is a prerequisite to obtaining its services does not detract from this conclusion [that the cooperative was a common carrier], since membership is readily attainable, involves no obligation that the payment of nominal dues, and has as its sole purpose eligibility for Bay Area's services."

[16] Voyager argues that there is no evidence that its operations divert from, or compete with, the airlines. This, it says, means that it is not engaged in common carriage. The conclusion simply does not flow from the premises. In any event, Voyager obviously is competing with the airlines. Most of its flights are to points served by the scheduled carriers; its fares are far lower, a point featured in its advertising; and it boasts in its brief that it provides faster service at more convenient times. Moreover, the record shows that most people joining Voyager did so because of the lure of lower fares than they would have to pay on the scheduled carriers.

[17] Voyager makes much of the fact that the Federal Aviation Administration found it eligible for an operating certificate under Part 123 of the

Judge Madden appears to have been influenced by his finding that Voyager did not intend to violate the law. However, "an evil purpose or intent to violate the law . . . is not necessary where acts themselves not wrong are made wrong by the limitations of a regulatory statute . . ." *Transocean A.L., Enforcement Proceeding*, 11 C.A.B. 350, 367 (1950). As Mr. Justice Holmes put it in *Horning* v. *District Columbia*, 254 U.S. 135, 137 (1920):

> "There is no question that the defendant intentionally maintained his storehouse and managed his business in the way described. It may be assumed that he intended not to break the law but only to get as near to the line as he could, which he had a right to do, but if the conduct described crossed the line, the fact that he desired to keep within it would not help him. It means only that he misconceived the law."

When Voyager began to hold itself out as providing air transportation for hire to members of the public who would join its ranks, Voyager crossed this line.

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Federal Aviation Regulations. Part 123 establishes safety regulations for the operation of air travel clubs operating large aircraft. While the requirements of Part 123 are similar to FAA requirements for air carriers, the premise upon which Part 123 authorizations are granted is that the club is not engaged in common carriage. However, the FAA determination is not meant to be a determination of the Board's jurisdiction under the economic regulatory provisions of the Act. Indeed, in the notice of proposed rulemaking which led to the adoption of Part 123, the FAA noted: "[I]f the operations [of a travel club] involve interstate, overseas, or foreign air transportation (common carriage), appropriate authority would be required from the Civil Aeronautics Board." 32 F.R. 10311. As the Department of Transportation noted in its submission in this proceeding, it is for the Board to determine its own jurisdiction and for the party involved then to qualify for the FAA license appropriate for his status as determined by the Board. The Board is no more bound by the FAA determination than Voyager is bound by an Internal Revenue Service determination that it was engaged in commercial carriage requiring payment by each passenger of the transportation tax applicable to regular airline passengers (Tr. 78-79).

Our decision here is based solely on the law and the facts pertinent to Voyager's activities. Some 30 organizations presently operate as flying clubs under Part 123 licenses from the FAA. Our decision here is not a holding that all are engaged in common carriage in violation of section 401(a). This is a determination which can only be made on the basis of the facts and circumstances peculiar to a given operation.

There remains the question of the remedial action the Board should take with respect to Voyager. Pointing out that it is "a $2,000,000 club," Voyager urges that a cease and desist order would cause "serious harm and loss to the members (advance trip deposits), to creditors, to the holders of the mortgages on the aircraft and to the employees." It suggests that the Board institute a proceeding to establish standards applicable to flying clubs.

Insofar as rulemaking is concerned, we are not clear as to what Voyager has in mind. Presumably, the idea is to formulate rules defining the boundaries between private and common carriage insofar as flying clubs are concerned. The very nature of the question, however, and the almost limitless variations in method of operation convince us that such a proceeding would be little less than futile. The bench marks of what constitutes a "common carrier" are quite clear under the *Transocean* and *Hacienda* tests. We believe that a case-by-case application of these standards is the only proper way to test whether the activities involved constitute a "common carrier."[19]

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[19] As the Court said in *Hacienda*, "the term 'common carrier' . . . is an ancient one in our law and has been applied in many factual and legal contexts." (298 F.2d at 433). Depending as it does on the peculiar facts and circumstances of a given operation, case-by-case adjudication has since time immemorial been the normal way of applying the term "common carriage."

Just as we find the rulemaking suggestion impractical, we find the plea based on economic hardship, while appealing in terms of the private interests of those benefitting from the unlawful activity, wholly unpersuasive from the viewpoint of our regulatory obligations. The mere fact that illegal operations have proven economically successful obviously cannot provide grounds for allowing them to continue. We thus believe that the appropriate remedy is an order requiring Voyager to cease and desist from operating as an air carrier in violation of Section 401(a).[20]

What this entails for Voyager is much more involved than a mere discontinuance of its past unlawful holding out. The nature of the problem is such that Voyager must rid itself of the benefits it has derived from that holding out, including "membership" directly or otherwise proximately attributable to it and Voyager's reputation as a readily-available source of low-rate air service. In other words, Voyager must cease holding out air transportation even to its so-called members.

To cease doing so requires much more than merely stopping its advertisements. Voyager's program and the ready and easy availability of eligibility to take advantage of it are surely by now so well known that continuing as before could be holding out by course of conduct even if all advertising were eliminated. However, simply retaining its membership roster at present levels and declining to receive new members is also insufficient. With a total present eligibility of approximately 51,000 persons, Voyager's membership is too large to be distinguished from the general public, especially since it appears some 85% of the current mem-

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[20] With regard to the three named individual respondents the Board will dismiss the complaint. The cease and desist order will bind Voyager, its directors, officers, employees, servants, agents, assigns and successors. Nothing would be gained by including the individual respondents.

bers became such by responding to Voyager's general solicitations. Voyager cannot expect—or be permitted—to retain the benefits it has obtained by its illegal course of conduct.

We recognize that our decision necessarily and unavoidably will require drastic changes for Voyager. Mindful of the impact on members of the public who in good faith are presently signed up for transportation in the immediate future, we will make our cease and desist order effective 60 days from the date of its issuance, conditioned, however, on Voyager's elimination of all advertising including mail, press, radio, television, personal solicitation, telephone solicitation, and all other forms of solicitation and on its discontinuing enrollment of members during that period.

In view of the foregoing and all the evidence of record, we find—

1. Voyager 1000, a corporation organized, existing, and doing business under the laws of the State of Indiana, has held itself out and continues to hold itself out to the public as a common carrier to provide transportation by aircraft of persons in interstate, overseas, and foreign commerce for compensation or hire and is an air carrier as defined in Section 101(3) of the Act engaged directly in the transportation of persons by air within the meaning of the Act.

2. Voyager 1000 has not held and does not hold a certificate of public convenience and necessity or other authority from the Board authorizing it to engage in air transportation of persons or property as a common carrier.

3. Voyager 1000 has been and continues to be in violation of Section 401(a) of the Act.

4. Voyager 1000 and its officers, directors, agents, employees, representatives, successors, and assigns should be

ordered to cease and desist from engaging in air transportation in violation of Section 401(a) of the Act.

5. This proceeding insofar as it relates to Adam Rueckert, Robert J. Fink, and A. Lee Clifford, each individually, should be dismissed.

An appropriate order wil be entered.

BROWNE, Chairman, GILLILLAND, Vice Chairman, MINETTI, MURPHY and TIMM, Members, concurred in the above opinion.

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[NOTE: The Civil Aeronautics Board attached to its opinion all of Judge Madden's Initial Decision (see Exhibit A above), except the section titled "Findings and Conclusions."]

**EXHIBIT C**

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

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NOVEMBER 14, 1973

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Before
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. WILLIAM J. CAMPBELL, *Senior District Judge**

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|---|---|
| No. 73-1222<br>VOYAGER 1000,<br>*Petitioner.*<br>v.<br>CIVIL AERONAUTICS BOARD,<br>*Respondent.* | On Petition for Review of an Order of the Civil Aeronautics Board. |

This cause came on to be heard on the transcript of the record from the Civil Aeronautics Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the decision of the Civil Aeronautics Board entered in this cause on March 1, 1973, be, and the same is hereby, ENFORCED, with costs, in accordance with the opinion of this Court filed this day.

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

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SEPTEMBER TERM, 1972—APRIL SESSION, 1973

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No. 73-1222
VOYAGER 1000,
*Petitioner,*

v.

CIVIL AERONAUTICS BOARD,
*Respondent.*

On Petition for Review of an Order of the Civil Aeronautics Board.

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ARGUED JUNE 7, 1973 — DECIDED NOVEMBER 14, 1973

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Before PELL and SPRECHER, *Circuit Judges,* and CAMPBELL, *Senior District Judge.*•

SPRECHER, *Circuit Judge.* Petitioner, Voyager 1000, seeks review of Order 73-3-1 issued by the Civil Aeronautics Board on March 1, 1973, directing petitioner to cease and desist from engaging in "air transportation" in violation of Section 401(a) of the Federal Aviation Act.[1] Section 401(a) of the Act states that "[n]o *air carrier* shall engage in any *air transportation* unless there is in force a

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• Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

[1] The Federal Aviation Act of 1958, 728 Stat. 731, 49 U.S.C. § 1301 *et seq.* (1970) [hereinafter cited as the Act].

certificate [of public convenience and necessity] issued by the Board authorizing such air carrier to engage in such transportation." 49 U.S.C. § 1371(a) (emphasis added). The issue presented on appeal is whether the Board's determination that Voyager was operating as an air carrier engaged in air transportation is supported by substantial evidence[2] and a reasonable basis in law. *Las Vegas Hacienda, Inc.* v. *C.A.B.*, 298 F.2d 430, 43-34 (9th Cir. 1962). We affirm the Board's order.

## I

In September, 1964, Voyager was founded as an Indiana non-profit corporation.[3] The founding members' plan was to organize a private flying club which would acquire an aircraft for recreational travel for a membership limited to 1000. Each member was required to pay an initiation fee of $125 ($200 per family membership) and monthly dues of $4, although in some instances these amounts were waived or reduced. The membership having reached 1,000 within a year, a second club, Voyager 2000, was formed and susequently merged into Voyager 1000.

In early 1968 when the membership total stood at 2,460, the club's cash resources were seriously depleted. The directors decided that a substantially larger dues paying membership was necessary to provide sufficient operating funds to keep the club on a healthy financial footing. The initial goal was set at 5,000 members; in September, 1970, the goal was increased to 20,000.

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[2] Section 1006 of the Act delineates the limits of judicial review of C.A.B. orders, providing in pertinent part that "findings of fact by the Board or Administrator, if supported by substantial evidence, shall be conclusive." 49 U.S.C. § 1486(e).

[3] Under the Indiana Not-For-Profit Corporation Act of 1971 (BURNS IND. STAT. ANN. §§ 25-501 to - 566 (Cum. Supp. 1972)), in the event of dissolution all assets in excess of obligations to creditors and lenders escheat to the state, BURNS IND. STAT. ANN. § 25-533.

Membership drive activities included the following:

(a) Familiarization with Voyager programs and facilities was proffered by means of open houses held in early 1968 in Indianapolis, Fort Wayne, Evansville, and Terre Haute, Indiana, and Columbus, Ohio. Newspapers in Indianapolis, Louisville and Cincinnati carried advertisements. When a Boeing jet was acquired, open houses to inspect this craft and "hear the Voyager 1000 story" were also held; these too were widely publicized. From June to September 1970, published announcements included lists of upcomping Voyager flights, stressed that the only initial outlay would be the advance payment of six months dues ($36) because the initiation fee was being waived, and stated that application forms would be available at the open house.

(b) Articles describing Voyager activities were prepared for publication in newspapers and magazines such as *Time* and *Travel Weekly*. During the last three months of 1970, from three to six commercials per week were broadcast over a Cincinnati radio station. In the spring of 1971, a full page advertisement was placed in *Holiday Magazine*.

(c) Existing Voyager members were offered the inducement of $10 in scrip redeemable in Voyager services for each "bonus membership" they procured.[4]

(d) Brochures describing flight programs in detail—dates, flight numbers, departure times, and fares—were mailed to non-members appearing on purchased commercial mailing-house lists and on large organization membership lists such as the Indiana State Teachers Association. For example, in the spring of 1972 Voyager had 100,000

[4] This approach resulted in 1,600 members by May 1, 1969, with bonus memberships coming in on an average of 25 a day.

copies of the "Europe '72 Program" brochure printed, more than seven times the then current membership.

(e) In early 1971, college students at Purdue University, Ball State Teachers College and Marion College were offered a one-year membership for $10. Free flights were offered to the individuals enrolling students.

(f) As part of the membership drive, the initiation fee and monthly dues were the subject of some variation, being waived or reduced in connection with particular programs. At the time of this proceeding, the cost of joining was $10 per membership and $7 per month.

(g) Throughout the period of the membership drive, advertisements appeared regularly in eight newspapers in Indiana, Ohio, and Kentucky with a combined circulation in excess of one million copies. These advertisements contained a selected listing of flights available to "Voyager Members Only" detailing dates and price per person. They also invited inquiry about membership, giving a phone number or containing a mail-in coupon. Many advertisements included the cost of membership.

This total effort resulted in approximately 12,100 new memberships, from 2,400 members in 1968 to 14,500 members in December, 1971. Since most memberships are owned by families, this represents an estimated 43,000 individuals eligible for Voyager flights.

As a result of increased membership, Voyager employs over 80 individuals, operates seven aircraft (a Boeing 720 jet, two Lockheed Electras, two DC-7's and two Martin 404's), and maintains its own terminal at Weir Cook International Airport in Indianapolis.

Voyagers flight program is extensive. Flights are announced from five to six months in advance and by flight

time are generally filled to capacity.[5] Although the Voyager program tends to concentrate on weekend trips and destinations which are novel, longer trips and more customary destinations are also available. Voyager operated 200 flights from March, 1970 to May, 1971 and 156 flights between July, 1971 and April, 1972.

Although concededly secondary to travel, there is also a social aspect to the club. Voyager conducts a series of parties planned around travel themes. Announcements are sent to members sometimes in combination with flight schedules; they include a reservation form and often encourage members to bring guests.

Participation in Voyager flights, parties and corporate elections[6] is limited to members whose dues are paid up. Immediately upon payment of the fee necessary to become a member, an individual is eligible for all Voyager activities and could conceivably take a Voyager flight scheduled for that same day if passage was available.

On November 16, 1971, the Director of C.A.B.'s Bureau of Enforcement (B.O.E.) docketed a complaint against Voyager alleging that Voyager was operating as a common carrier for compensation or hire without authority from the Board in violation of § 401(a) of the Act. The alleged aspects of common carriage included Voyager's mass media campaign for new members and the lack of eligibility qualifications for membership other than the payment of fees and dues. Following evidentiary proceedings, the Administrative Law Judge issued his initial decision with order attached on June 22, 1972, dismiss-

[5] During the 12 months prior to the institution of this proceeding, Voyager carried some 24,000 members.

[6] Membership confers certain rights similar to those held by shareholders of a business corporation including the right to notice of elections and rights to nominate and vote on directors.

ing the petition for enforcement and the complaint. The B.O.E. petitioned for discretionary review of the initial decision, and the Board undertook review. On March 1, 1973, the Board issued its decision reversing the Administrative Law Judge.

## II

Economic and safety regulation of air transportation is provided by the Federal Aviation Act. Engaging in air transportation is conditioned upon obtaining the appropriate economic authority from the Civil Aeronautics Board (49 U.S.C. §§ 1371-87) and safety authority from the Administrator of the Federal Aviation Agency (49 U.S.C. §§ 1421-31). Voyager 1000 has operated since 1968 under Part 123 of the Federal Aviation Regulations entitled "Certificate and Operations: Air Travel Clubs Using Large Airplanes." 14 C.F.R. §§ 123.1-53 (1973). Part 123 basically tailors the commercial operator certification and safety standards of Part 121 (14 C.F.R. § 121.1 *et seq.*)[7] to air travel club (A.T.C.) characteristics. 33 Fed. Reg. 12887 (1968). Economic authority is not required for the issuance of an operating certificate under Part 123. Certification of a person by the F.A.A. as an air travel club under Part 123 does not authorize operations as an air carrier in air transportation. 14 C.F.R. § 123.1(c).

An air travel club is, by definition, a

> "person who engages in the carriage by airplanes of persons who are required to qualify for that carriage by payment of an assessment, dues, membership fee, or other similar type remittance."

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[7] A commercial operator is defined as "a person who, for compensation or hire, engages in the carrier by aircraft in air commerce of persons or property, *other than as an air carrier*. . . ." 14 C.F.R. § 1.1 (emphasis added).

14 C.F.R. § 123.1(b). An air travel club differs from commercial operators in that the operations are non-profit, air schedules are sporadic, and aircraft are operated for a relatively small number of hours. 33 Fed. Reg. 12887 (1968).

Although the reasons for requiring safety regulation of air travel clubs are well defined,[8] the reasons for allowing their operation outside the economic regulatory scheme in the first instance have not been clearly articulated. Apparently at the outset these clubs were so small and the members were so intimately related that their operations were simply not relevant in any respect to commercial aviation. During the 1960's, however, the F.A.A. noted the growth of a different kind of organization.

> "During the past few years, a number of travel clubs have been formed for the purpose of providing their members with long-distance travel usually on large (over 12,500 lbs. takeoff weight) aircraft. In most cases, these clubs operate on the basis that the members share the expenses of the travel by an assessment, dues, membership fee, or similar payment to the club."

32 Fed. Reg. 10311 (1967). When the F.A.A. was considering applying the safety standards of Part 121 to A.T.C.'s, the C.A.B. probably participated, as it normally does, in the making of the proposed rule by communicating its

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[8] "From a safety standpoint, when a passenger has, in any manner, paid for his carriage aboard a large aircraft the FAA believes that the applicable safety standards should not depend on a distinction as to whether that passenger is carried for 'compension or hire' or is 'sharing expenses' with other passengers. The average passenger certainly is not aware that the method by which he pays for his carriage determines the level of safety that the operator of the aircraft is required to maintain. Except for the method of payment, the typical travel club operation is in all practical respects no different from a charter flight conducted by a commercial operator, and the FAA believes that the level of safety required by Part 121 should be maintained." 32 Fed. Reg. 10311 (1967).

opinions and suggestions. These communications have not been disclosed. In the present proceeding, the B.O.E. avoided setting out its concept of the proper basis for distinguishing A.T.C.'s from common carriers.

> "The Bureau takes no position on what criteria should be used to distinguish between valid private flying clubs and common carriers, for purposes of the Board's jurisdiction." Record at 827.

In 1971, the F.A.A. was of the opinion that air travel club operations constituted private carriage:

> "It is of the opinion [*sic*] of the FAA that as long as air travel club aircraft are owned by the club members on a non-profit basis, solely for the carriage of its members on pleasure trips, these aircraft should be regarded as private carriage versus common carriers by commercial operators."[9]

However, no attempt was made to set out the underlying reasons why such operations were not considered to present competition injurious to the regularly scheduled airlines except to note that A.T.C.'s do not transport for compensation or hire.

> "As air travel clubs are a non-profit organization, they are not allowed to fly passengers or cargo for hire. Therefore, they are not required to, or allowed to secure from the CAB a Certificate of Convenience and Necessity, as required by commercial operators."[10]

Clearly this is an insufficient rationalizing principle since the effect of being non-profit is that A.T.C.'s provide transportation at a price which does not include a profit factor. What could present stronger competition to the commercial airlines?

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[9] Opinion Letter from F.A.A. to Voyager 1000, Aug. 2, 1971. Record at 629.

[10] *Id.*

Because the Act ultimately defines air transportation as "carriage by aircraft . . . as a common carrier,"[11] the Board's determination that Voyager is an air carrier engaged in air transportation (which, in the absence of a certificate of public convenience and necessity, is in violation of Section 401(a) of the Act) is based on its finding that Voyager is operating as a common carrier. Although the Act itself does not further define common carriage, this term is of an ancient legal vintage. Narrowing the broad range of possible applicable definitions are the stated purposes underlying the regulatory functions of the C.A.B.

> "The Civil Aeronautics Board is under an affirmative statutory duty to exercise its regulatory powers over 'air transportation' so as to foster sound economic conditions, promote economical and efficient service at reasonable charges, and avoid destructive competitive practices. The legislative history of the Act emphasizes the importance attached by the Congress to the achievement of these purposes. Obviously the economic regulation contemplated by the statute can be effective only if the commercial activity to which it is made applicable—'air transportation'—represents a reasonably discrete market in practical business terms."[12]

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[11] Section 101 of the Act defines "air carrier" as

> "any citizen of the United States who undertakes, whether directly or indirectly or by a lease or other arrangement, to engage in air transportation . . ."

49 U.S.C. § 1301(3): "Air transportation" is defined as "interstate, overseas, or foreign air transportation . . ." (49 U.S.C. § 1301(21)), terms which are respectively defined as

> "the carriage by aircraft of persons or property as a *common carrier* for compensation or hire . . . in commerce . . ."

between states, between states and Territories or possessions, and between the United States and any other place. 49 U.S.C. § 1301(21) (emphasis added).

[12] *Las Vegas Hacienda, Inc.* v. *C.A.B.*, 298 F.2d 430, 432-33 (9th Cir. 1962) (footnotes omitted).

Thus the Board's attempt to define common carriage is an attempt to delineate that market which is the object of the regulatory scheme—"the furnishing of transportation by air to the general public on a commercial basis." *Las Vegas Hacienda*, 298 F.2d at 436.

We would agree that "the typical travel club operation is in all practical respects no different from a charter flight conducted by a commercial operator . . ." (*Supra* note 8), at least for the limited purpose of appraising their competitive impact on commercial airlines. The market served by Voyager is strikingly similar to the charter flight market.

The recent opinion by the Second Circuit in *Saturn Airways, Inc.* v. *C.A.B.*, 483 F.2d 1284 (1973) upholding the Board's promulgation of regulations providing for a new type of charter, the Travel Group Charter (T.G.C.), is instructive. Inasmuch as charter trips are provided by supplemental air carriers pursuant to a certificate of public convenience and necessity (49 U.S.C. § 1371(d)(3)), the question involved in *Saturn* was not one of common carriage status. Nevertheless, the validity of the Board's authorization of T.G.C.'s was determined by reference to the importance of the distinction between individually ticketed and group fare markets and the appropriate line to be drawn between the two.

> "The supplemental air carriers, once known as 'non-scheduled' or 'irregular' air carriers, are meant to provide a supplementary service to that of the scheduled or trunkline carriers, who offer individually ticketed, regularly scheduled service to the general public. Since the supplementals are not subject to the economic rigors attendant upon a regularly scheduled, individually ticketed service, for they essentially fly when they desire and nearly always carry a full planeload of passengers, the air fares

> for comparable routes on charter flights can be significantly less than those offered by the scheduled air carriers. Congress in providing for certification of the supplementals recognized the potential problem of competition and the real possibility that if not carefully controlled they would supplant, rather than supplement, the regularly scheduled service. *See generally American Airlines, Inc.* v. *CAB, supra,* 365 F.2d at 944-45. Individually ticketed, regularly scheduled service is the mainstay of an efficient air transportation system, and a critical necessity in any sophisticated economy. Congress realized that it must be preserved. Accordingly, the legislative history and language of the statute itself manifest a congressional intent that although the Board should have the power of definition, it should never permit 'individually ticketed service to be offered to the general public under the guise of charter.' Sen. Rep. No. 688, 87th Cong., 1st Sess. 13 (1961)." (483 F.2d at 1287-88).

The court concluded that the T.G.C. regulations, "where individual travelers without a community of interest apart from transportation are organized by a third party and . . . charter an aircraft on a pro rata basis" (483 F.2d at 1287), adequately preserve the distinction between group and individually ticketed markets where differences such as the following are required: (1) charter travelers are liable for a pro rata share of the cost which share is subject to variation depending upon the final load factor; (2) the group must be formed and members must have paid 25 percent of the minimum charter price not later than three months prior to the scheduled departure time; (3) participants must pay the total remaining balance of the flight fare not later than two months prior to the departure date; (4) the deposit and balance payments are with certain exceptions non-refundable; (5) the flight may be cancelled up to 45 days prior to departure due to passenger defaults;

and, (6) participants must depart and return as a group subject to predetermined trip duration restrictions. 483 F.2d at 1292; See 14 C.F.R. §§ 372a.1-.50.

The distinguishing factors cited by the court are ones which eliminate from charter service those members of the traveling public who require transportation on short notice without risk of cancellation or restrictions on return accommodations.[13] The Board's determination in the instant case revolved around the relevant characteristics of petitioner's operation which failed to eliminate from A.T.C. service members of the individually ticketed market.

The cases setting forth the principles applicable to the determination of common carrier status interpret the Act as "bringing within the regulatory scheme all those who compete in the commercial market in the business of offering air transportation to the public generally." *Las Vegas Hacienda*, 298 F.2d at 434. To ascertain whether a particular operation is so competing, the critical determination is whether the operation is one which holds itself out "as ready and willing to undertake for hire the transportation of passengers or property from place to place, and so incites the patronage of the public." *Transocean Air Lines, Inc., Enforcement Proceeding*, 11 C.A.B. 350, 352 (1950). In the instant case, the Board examined both the nature of the "membership drives" and the extent of qualifications for membership as they relate to a "holding out to the public or a segment of the public."

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[13] The court's analysis quite properly demonstrated the limitations on the Board's affirmative statutory duties. The desired result is not to remove all operations which compete with commercial airlines but rather to regulate only those operations which affect the economic soundness of regularly scheduled point-to-point air transportation. The economic stability of commercial airlines is to be preserved not for the benefit of the airlines *per se* but only insofar as that stability is necessary to the maintenance of an adequate national and international transportation system.

"The breadth of the activities contemplated under the term 'common carrier' reflects the great variety of recognized means whereby the 'holding out' may be accomplished. The most obvious method of a holding out which may result in common carriage is advertising through magazines, newspapers, posters, brochures, and the like. Should the evidence disclose that a carrier has advertised its services in such manner as to solicit business from the general public, the necessary implication arises that it has held itself out as being in readiness to carry for all who might apply. Nevertheless, the lack of advertising is not in itself determinative of whether there has been a holding out since a holding out may take place through other methods.

". . . [T]he requisite holding out may be evinced by any means which communicates to the public that a transportation service is indiscriminately available. A reputation gained through merely serving the public indiscriminately may be sufficient in itself to inform the public that the carrier will carry for all who apply within the limits of its facilities.

"Furthermore, it is clear that a carrier need not undertake to serve all the public in order to be considered a common carrier, but may limit its transportation services to a class or segment of the general public so long as it expresses a willingness to provide transportation for all within this class or segment indiscriminately." *Transocean Air Lines*, 11 C.A.B. 352-53 (footnotes omitted).

Regarding the propriety of the membership drives, Voyager argued that its advertisements were announcements to members coupled with invitations to join, that advertising is permissible so long as its thrust is to acquaint nonmembers with the advantages of membership, that solicitation of new members generally is proper so long as such soliciation is not designed to sell individual flights to members of the public, and that in any event there was no

evidence that such advertising diverted passengers from common carrier flights.[14]

With respect to the qualifications for membership, petitioner argued that it does not hold itself out as willing to carrying all passengers but only members; that Voyager membership does not constitute a segment of the general public because the fees represent a real and substantial investment and are an absolute prerequisite to participation; that the members have a legal interest in the club's assets until dissolution, and the social aspects of the club differentiate the membership from the traveling public; and, that as a practical matter the members do not receive individually ticketed service.[15]

Concerning the contention that the membership drive activities constituted a "holding out," the Administrative Law Judge concluded as follows:

> "The Bureau reads the advertising program as being directed to members of the public generally and as inviting them to fly Voyager as though it were a commercial enterprise. . . .
>
> "The respondents deny that this was the purpose, either overt or covert, and the evidence sustains them. The adds [*sic*] clearly stated that the trips were available only to Voyager members. Insofar

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[14] The record shows that in a typical month, November, 1971, out of 15 Voyager destinations only two such destinations were advertised by travel agents. In conversations with travel agents, petitioner found that its elapsed time was less than half that of the best common carrier service in five of eight examples.

[15] In 1971, Voyager conducted a survey of its membership based on a random selection of 200 members. Every fiftieth member on the Master Membership files who was current in dues payment was selected and a questionnaire was sent to him or her. Among other things, the totals showed that the average time between joining and traveling was 5-½ months. The survey does not provide information on individuals who had stopped paying dues. The record does not show the average time between making reservations and flying.

> as their placement was part of a campaign to increase the membership that was the exercise of a legitimate right as long as the original purpose of the club was not being changed. The listing of prospective flights and the costs can be fairly read as an effective device to illustrate the advantages of being a member. It was certainly effective as part of the expansion plan. If in its concept Voyager was a private club engaging in private carriage, as it clearly was, simply increasing the number of members does not add an insidious noted [*sic*]."

The Administrative Law Judge further concluded that advertising directed to prospective members does not constitute solicitation of the general public; Voyager advertisements contained "an element of selectiveness in that they were addressed to persons travel-minded in the manner of the original Voyager members."

In assessing the qualifications of Voyager membership in terms of their effectiveness in differentiating members from the general public, the Administrative Law Judge found that although

> "there is little or no screening of an applicant beyond the payment of initiation fee and dues there is a built-in screening by the mere fact of application for membership. By such application, particularly after exposure to explanations of the purposes of the club, an applicant, inferentially but effectively, declares an affinity with the existing members."

Furthermore, the Administrative Law Judge viewed the financial outlay as real and substantial when viewed in the aggregate.

The Board reversed the initial decision of the Administrative Law Judge on the basis of the legal significance of the facts as found. The cases and the purposes underlying the regulatory scheme support the Board's decision.

The fact that petitioner believed that it was engaged in private carriage and had no intention of violating the law is not determinative of the question.

Petitioner's claims of uniqueness, capacity to provide faster and more convenient service, and ability to offer air travel to individuals unable to afford commercial rates all relate to the question of whether a certificate or exemption should issue and not to the determination of common carrier status. See *Las Vegas Hacienda*, 298 F.2d at 438-39.

The question of the propriety of mass media advertisements can not be resolved simply by determining whether the ads solicit members, as those in the instant case clearly did. We would agree with the Administrative Law Judge that an increase in the membership does not necessarily result in a transformation from private to public carriage. Rather, the proper inquiry is whether the ads solicit prospective members where the membership is defined in such a manner as to be undifferentiated from the traveling public at large. Thus the fact that the ads are addressed "To Members Only" is not dispositive.

The Administrative Law Judge cites the membership fees and dues and the declared affinity, by virtue of application for membership, with "persons travel-minded in the manner" of the existing members as providing sufficient differentiation from the general public. The Board found the financial outlay to be "relatively insignificant, particularly when viewed in light of the fare bargains it buys."[16] Since the avowed purpose of Voyager is group travel, the affinity involved in Voyager membership is a common interest in travel. To employ affinity in this manner begs the question.

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[16] As a practical matter the fees become part of the transportation cost which in total amounts to less than commercial fares.

Insofar as the affinity only relates to travel,[17] the nature of the travel services provided must be differentiated from the individually ticketed market. Here, members were eligible to fly as soon as they joined and there was no prescribed waiting period between making reservations and flying. The record is void of criteria which would indicate sufficient differentiation betwen Voyager services and individually ticketed services.

There was substantial evidence and a reasonable basis in law for the Board's finding that "[d]espite the various labels Voyager attaches to itself and to various aspects of its method of operation, it is 'furnishing transportation by air to the general public on a commercial basis' . . . and hence it engaged in 'air transportation' within the meaning of the act."

ORDERED ENFORCED.

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PELL, *Circuit Judge*, concurring.

I concur in the foregoing opinion although I do so with considerable reluctance. My disinclination, however, arises from no feeling that a legally incorrect result has been reached. Indeed, Judge Sprecher's well reasoned opinion leaves little area, it seems to me, for disagreement with the legal premises it sets forth and applies.

It is somewhat ironical, and perhaps to be deplored, that in a society which generally encourages competitive free enterprise a service is to be stifled which a substantial segment of citizenry of the Midwest portion of the country found to be highly desirable in making available travel by

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[17] It is not clear how the establishment of a prior affinity among Voyager's members would help petitioner's case. The C.A.B. has recently begun experimenting with the discontinuance of the affinity group concept due to the fact that it discriminates against individuals not belonging to groups which are charterworthy. 37 Fed. Reg. 20808 (1972).

air which might not otherwise have been enjoyed by them, and which travel has been conducted in full compliance with governmental safety requirements.

While this travel presumably was ordinarily for pleasure rather than business reasons, the right of such movement is one that has received Supreme Court recognition.

> "This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Shapiro* v. *Thompson,* 394 U.S. 618, 629 (1969).

While the further movement of the Voyager members is perforce restricted by our upholding of the administrative determination here involved, we are unable to say that it is not supported by substantial evidence, nor that it is an unconstitutionally unreasonable application of the guidelines laid down by the Congress. That body has as a policy matter legislated where competing interests are involved. It is our function in the judiciary not to make the law but only to determine what it is and whether it exceeds constitutional limitations either as stated or as applied.

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Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit.*

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